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FEB 9 '61

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40125

FRANKLIN MacVEAGH & COMPANY,
a corporation,

Appellee,

v.

WASYL KORPAN,

Appellant.

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299 I.A. 609¹

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On June 24, 1937, plaintiff filed two actions against defendant in the Municipal court of Chicago and on that day two judgments by confession were rendered, one in the sum of \$169.50 and the other in the sum of \$368.76. Defendant filed amended petitions to vacate the judgments and on July 29, 1937, an order was entered giving defendant the right to appear and defend, the judgments to stand as security. The causes came on for trial on December 20, 1937, when orders were entered confirming the original judgments, from which orders the instant appeal (Gen. No. 40125) and the appeal in the case of Franklin MacVeagh & Company, a corporation, v. Wasyl Korpan, Gen. No. 40126, are prosecuted. The instant appeal was consolidated for hearing with the appeal in Gen. No. 40126.

The judgments were entered on two separate chattel mortgage notes dated November 23, 1934. On April 1, 1935, plaintiff, the mortgagee, foreclosed the chattel mortgages and sales of the chattels secured thereby took place. The proceeds of the sales were not sufficient to satisfy the indebtedness secured by either of the notes. After the sales under the chattel mortgages, and on April 26, 1935, the parties entered into the following written agreement:

"AGREEMENT.

"IT IS HEREBY AGREED between Franklin MacVeagh & Co., a

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APPEAL FROM MUNICIPAL
COURT OF CHICAGO

Appellant
v.
Appellee
FRANKLIN MACVORSE & COMPANY,
a corporation

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On June 24, 1937, plaintiff filed two actions against defend-
ant in the Municipal Court of Chicago and on that day two judgments
by confession were rendered, one in the sum of \$169.50 and the other
in the sum of \$368.76. Defendant filed amended petitions to vacate
the judgments and on July 29, 1937, an order was entered giving
defendant the right to appear and defend, the judgments to stand as
security. The cases came on for trial on December 30, 1937, when
orders were entered confirming the original judgments, from which
orders the instant appeal (Gen. No. 40126) and the appeal in the
case of Franklin MacVorse & Company, a corporation, v. Wasyly Korian,
Gen. No. 40126, are prosecuted. The instant appeal was consolidated
for hearing with the appeal in Gen. No. 40126.
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notes dated November 23, 1934. On April 1, 1935, plaintiff, the
mortgagee, foreclosed the chattel mortgages and sales of the chattels
secured thereby took place. The proceeds of the sales were not
sufficient to satisfy the indebtedness secured by either of the
notes. After the sales under the chattel mortgages, and on April
26, 1935, the parties entered into the following written agreement:

"AGREEMENT"

IT IS HEREBY AGREED between Franklin MacVorse & Co., a

corporation, by its duly authorized agent and Secretary, Arthur L. Ludolph, party of the first part and Wasyl Korpan, party of the second part as follows: WITNESSETH:

"WHEREAS, the said Franklin MacVeagh & Co., a corporation had a chattel mortgage on the stock and fixtures of the said party of the second part at Number 7214 Greenwood Avenue, Chicago, Illinois, and

"WHEREAS, it took possession of said property under and by virtue of said chattel mortgage on, to-wit: the twenty-fifth day of March, A. D. 1935, and held a sale under said chattel mortgage foreclosure on, to-wit April First, 1935, and has remained in possession of said store up to the present time; and

"WHEREAS, the said Wasyl Korpan is the landlord and owner of the property at said address and might be entitled to compensation for the use and occupation of said premises during the time of said foreclosure up to the present time:

"NOW, THEREFORE, in consideration of one dollar, the receipt of which is hereby acknowledged, and also other valuable consideration each to the other,

"IT IS HEREBY AGREED by and between the parties hereto:

"FIRST: That the said Franklin MacVeagh & Co., a corporation are to convey to the said Wasyl Korpan One Dayton Scale #571-- Serial #1089107--30# Capacity and one National Cash Register #387416BB-1728E in consideration of the release of the payment of rent for the premises during the occupancy by the said Franklin MacVeagh & Co., a corporation, or its agent, and until the party of the first part secures a tenant who may be selected and decided upon for said store, said tenant to be secured within the next three months; and

"IT IS FURTHER DISTINCTLY UNDERSTOOD AND AGREED that the party of the second part, Wasyl Korpan, will not charge, or hold the party of the first part liable for any rent for the use of said store during the period and process of securing a new tenant; and

"FURTHER, the said party of the second part, Wasyl Korpan shall not molest, enter or in any way take, or cause to be removed any of the merchandise or equipment from said store.

"SECOND: That in consideration of the above, a mutual release is given between the parties hereto. The said Wasyl Korpan releases the said Franklin MacVeagh & Co., a corporation or its agent from the payment of any rent or any damages or any claim of any kind or character against said property; or any moneys due said Wasyl Korpan in consideration of any act, and the said Franklin MacVeagh & Co., a corporation, releases the said Wasyl Korpan of any moneys due said Franklin MacVeagh & Co., a corporation, by reason of the fact that the property foreclosed did not bring the full amount of the claim due and owing by the said Wasyl Korpan.

"IT IS FURTHER AGREED by and between the parties hereto that the transfer and sale of the Dayton Scale and National Cash Register is contingent under the sale of the store to a third party as a going business and tenant for said Korpan but if it becomes necessary to remove said property from said premises, said scale and cash register is the property of Franklin MacVeagh & Co., a corporation, and does not enter into this agreement as a consideration

corporation, by its duly authorized agent and Secretary, Arthur J. Lindolph, party of the first part and Wasyly Korpan, party of the second part as follows: WITNESSETH:

"WHEREAS, the said Franklin MacVeach & Co., a corporation had a chattel mortgage on the stock and fixtures of the said party of the second part at Number 7234 Greenwood Avenue, Chicago, Illinois; and

"WHEREAS, it took possession of said property under and by virtue of said chattel mortgage on, to-wit: the twenty-fifth day of March, A. D. 1933, and held a sale under said chattel mortgage foreclosure on, to-wit April First, 1933, and has remained in possession of said store up to the present time; and

"WHEREAS, the said Wasyly Korpan is the landlord and owner of the property at said address and might be entitled to compensation for the use and occupation of said premises during the time of said foreclosure up to the present time:

"NOW, THEREFORE, in consideration of one dollar, the receipt of which is hereby acknowledged, and also other valuable consideration each to the other,

"IT IS HEREBY AGREED by and between the parties hereto:

"FIRST: That the said Franklin MacVeach & Co., a corporation are to convey to the said Wasyly Korpan One Dayton Scale, Serial #1039107--304, Capacity and one National Cash Register #345412B-1728 in consideration of the release of the payment of rent for the premises during the occupancy by the said Franklin MacVeach & Co., a corporation, or its agent, and until the party of the first part secures a tenant who may be selected and decided upon for said store, said tenant to be secured within the next three months; and

"IT IS FURTHER DISTINCTLY UNDERSTOOD AND AGREED that the party of the second part, Wasyly Korpan, will not charge, or hold the party of the first part liable for any rent for the use of said store during the period and process of securing a new tenant; and

"FURTHER, the said party of the second part, Wasyly Korpan shall not molest, enter or in any way take, or cause to be removed any of the merchandise or equipment from said store.

"SECOND: That in consideration of the above, a mutual release is given between the parties hereto. The said Wasyly Korpan releases the said Franklin MacVeach & Co., a corporation or its agent from the payment of any rent or any damages or any claim of any kind or character against said property; or any moneys due said Wasyly Korpan in consideration of any act, and the said Franklin MacVeach & Co., a corporation, releases the said Wasyly Korpan of any moneys due said Franklin MacVeach & Co., a corporation, by reason of the fact that the property foreclosed did not bring the full amount of the claim due and owing by the said Wasyly Korpan.

"IT IS FURTHER AGREED by and between the parties hereto that the transfer and sale of the Dayton Scale and National Cash Register is contingent under the sale of the store to a third party as a going business and tenant for said Korpan but if it becomes necessary to remove said property from said premises, said scale and cash register is the property of Franklin MacVeach & Co., a corporation, and does not enter into this agreement as a consideration

for the release of the payment of rent during the occupancy of said store by Franklin MacVeagh & Co., a corporation, during the time said Franklin MacVeagh & Co., a corporation, is not only securing a purchaser for the said store but a tenant for said store."

The agreement constituted a conditional release. Defendant owned the real estate where the chattels were located. Both parties would benefit if the chattels remained on the premises while an effort was made to rent the premises to a new tenant. Thereby defendant would have a tenant and plaintiff a purchaser for the chattels. Defendant agreed not to charge any rent until a tenant was procured. The parties contemplated that a tenant would be procured within three months. Plaintiff agreed to convey to defendant a scale and cash register. Defendant promised not to molest plaintiff or enter the store or take or cause to be removed any of the merchandise or equipment from the store. In consideration of the mutual promises defendant released plaintiff from paying rent and from any liability for damages, and plaintiff released defendant from any claim on account of a deficiency in the sale of the mortgaged chattels. No transcript of the testimony was preserved. However, the court certifies that the testimony established that subsequent to the quoted agreement,

"(a) Defendant, Wasyl Korpan, did enter the said store and removed merchandise and equipment from said store and converted same to his own use.

"(b) Defendant, Wasyl Korpan, refused to allow the purchaser secured by plaintiff within two months after the execution of said agreement, to take possession of said merchandise and fixtures, and said defendant, Wasyl Korpan, actually boarded up and padlocked the said store premises so that plaintiff was unable to obtain its property.

"(c) Defendant, Wasyl Korpan, demanded and received from plaintiff, subsequent to the execution of said agreement, the sum of two hundred dollars (\$200.00), as rental and charges for the use of said store, contrary to the express terms of said release agreement."

Thereupon the court found that the defendant had breached and failed to carry out the terms of the agreement, and that the agreement was abrogated by the subsequent actions of the parties.

for the release of the payment of rent during the occupancy of said store by Franklin MacVicar & Co., a corporation, during the term of the lease. It is not the intention of the court to award a judgment for the release of the store but a return for said store.

It is the intention of the court to award a judgment for the release of the store but a return for said store.

where the real estate where the chattels were located. With respect to the benefit of the chattels remained on the premises which an agreement was made to rent the premises to a new tenant. However, defendant would have a tenant and plaintiff a purchaser for the chattels. Defendant agreed not to charge any rent until a tenant was procured. The parties contemplated that a tenant would be procured within three months. Plaintiff agreed to convey to defendant a lease and cash register. Defendant promised not to molest plaintiff or enter the store or take or cause to be removed any of the merchandise or equipment from the store. In consideration of the above, plaintiff paid to defendant the sum of \$100.00.

It is the intention of the court to award a judgment for the release of the store but a return for said store.

It is the intention of the court to award a judgment for the release of the store but a return for said store.

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It is the intention of the court to award a judgment for the release of the store but a return for said store.

A consideration of the record convinces us that no error was committed and that the judgment of the Municipal court of Chicago in the instant appeal, Gen. No. 40125, should be and it is affirmed.

JUDGMENT AFFIRMED.

Sullivan and Friend, JJ., concur.

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Chicago in the instant case, ...
it is ...

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40126

FRANKLIN MACVEAGH & COMPANY,
a corporation,
Appellee,

v.

WASYL KORPAN,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

299 I.A. 609²

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

This appeal was consolidated for hearing with the appeal in the case of Franklin MacVeagh & Company, a corporation, v. Wasyl Korpan, Gen. No. 40125, in which case we have this day filed an opinion. The facts and reasoning in that case are applicable to this case; therefore, the judgment of the Municipal court of Chicago in the instant appeal, Gen. No. 40126, should be and it is affirmed.

JUDGMENT AFFIRMED.

Sullivan and Friend, JJ., concur.

1000



1000 A.1883

This figure is a diagram of a triangle with vertices A, B, and C. The triangle is drawn with thin lines and has a light blue background. The vertices are labeled A, B, and C. A line segment connects A and B, and another connects A and C. A third line segment connects B and C. There are additional lines extending from each vertex, possibly representing angles or projections. The diagram is drawn with thin lines and has a light blue background.

1000 A.1883

40282

MORRIS B. ROME and GERTRUDE
ROME,
Appellants,

v.

D. WARSHAFSKY, INC., a
corporation,
Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

299 I.A. 609³

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On December 14, 1937, plaintiffs filed, in the Municipal court of Chicago, their statement of claim consisting of two counts. The first count sought rent claimed to be due from defendant for November, 1937, and two days of December, 1937; and the second count sought \$190 for an alleged wrongful conversion of an iron door. The summons was returnable on December 27, 1937, at which time defendant filed its appearance and demand for a jury trial, and an order was entered granting the defendant an extension of ten days within which to file its affidavit of merits, and the cause was continued to January 10, 1938. When the case was called on that day it appeared that no affidavit of merits had been filed and accordingly defendant was defaulted and judgment entered against it for \$740. On February 21, 1938, being forty-one days after the entry of the judgment, the attorney for defendant filed a petition in which he recited that after the entry of the order allowing defendant an extension of ten days in which to file its affidavit of merits he became very ill and was unable to attend to his duties and by reason thereof was unable to file an affidavit. The petition also stated, by way of conclusion, that the defendant had a full and complete defense to the whole of plaintiffs' case, without, however, alleging the ultimate facts. On February 25, 1938, defendant obtained leave to file an amendment to its petition, an affidavit of defense,

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE: [illegible]
[illegible]

Case No. 100-10000

Defendant: [illegible]

Plaintiff: [illegible]

On December 12, 1957, Plaintiff filed in the Southern

District of New York, a complaint on behalf of two

persons. The first named party was charged with the crime

of conspiracy to defraud, and the second, with

aiding and abetting. The complaint was captioned as follows:

"The complaint was captioned as follows: 'In re: [illegible],
[illegible]'."

At which time Defendant filed the answer and denied the

allegations of the complaint. The complaint was captioned as follows:

"In re: [illegible], [illegible] and [illegible],
[illegible] and [illegible]."

On January 14, 1958, when the case was called

on for trial, it was postponed to January 21, 1958.

On January 21, 1958, the case was called on for trial

and the jury was sworn. The jury was composed of [illegible]

and the foreman was [illegible]. The jury was sworn

and the case was called on for trial. The jury was

sworn and the case was called on for trial. The jury was

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and a "doctor's certificate," all of which were filed. Plaintiffs were ruled to plead, answer or demur. They filed a pleading which amounted to a demurrer. The "certificate" of the physician, dated February 24, 1938, was addressed, "To Whomever It May Concern," and recited that the attorney for defendant had been under his care since December 15, 1937, and that during that time he was confined to his home "a great deal of the time. He is still under my professional care at this time, although his physical condition is considerably improved." The court sustained defendant's motion, vacated the judgment, and reinstated the cause, and from that order plaintiffs prosecute this appeal. Defendant did not file any brief in this court.

Since the motion to vacate the judgment was made more than thirty days after the entry thereof, it was necessary for defendant to present a petition that would definitely show errors of fact which might have been corrected at common law by a writ of error coram nobis or that would entitle him to relief by complaint in equity. Under the practice in the Municipal court of Chicago the same relief that could have been given by a bill in equity or at common law by a writ of error coram nobis may be afforded by a petition or a motion. In the case of Clark v. Swine, 93 Ill. 572, plaintiff filed a bill to enjoin the enforcement of judgments. The Supreme court held that the bill showed that in fact the judgment creditors were indebted to the judgment debtors, and stated (p. 575):

"It follows, therefore, that it would be inequitable and against conscience to enforce their payment. But this alone, as we have just seen, does not warrant a court of equity in interposing to prevent the consummation of such a wrong. By the rule above laid down, appellant must go a step further before he is entitled to such relief, and show that he was prevented from making his defence at law by some fraud, accident or mistake, without any laches or neglect on his part."

In that case it was contended that the attorney who had been retained by the defendant was in ill health, which prevented him from filing a plea. The court said (p. 577):

"If the general health of an attorney breaks down, he should notify his clients of the fact, so that they can take such

and a "doctor's certificate," all of which were filed. Exhibits were filed as filed, under 82-10000. They filed a "doctor's certificate" of the physician, dated February 24, 1933, and captioned, "The Honorable Dr. W. H. Johnson," and recited that the attorney for defendants had been under the same since December 11, 1932, and that during that time he was confined to his home "a great deal of the time. He is still under my professional care at this time, although his physical condition is considerably improved." The court examined the certificate and the physician's promise, and rejected the same, and then that court affirmed the previous order on appeal. Judgment was not filed on appeal in this case. Since the motion to vacate the judgment was made more than thirty days after the entry thereof, it was necessary for defendant to present a petition that would definitely show error of fact which might have been corrected at common law by a writ of error coram nobis or that would enable him to relief by certifying in equity. Under the practice in the Municipal Court of Chicago the same relief that could have been given by a bill in equity or at common law by a writ of error coram nobis may be afforded by a petition or a motion. In the case of Clark v. Board, 82 Ill. 204, 1884, 11 Ill. 204, 1884, 11 Ill. 204, 1884, the defendant of judgment. The judgment court held that the bill showed that in fact the judgment execution was issued to the defendant before, and stated (p. 204):

"It follows, therefore, that if would be inadvisable to grant defendant to enforce their payment. But this court, as we have just seen, does not intend to grant a writ of error coram nobis to prevent the continuation of such a writ. If the state laid down, defendant must go to a legal remedy before he is entitled to such relief, and show that he was prevented from making his defense at law by some fraud, accident or mistake, without any fraud or neglect on his part."

In that case it was decided that the attorney who had been retained by the defendant was in fact hostile, which rendered his testimony inadmissible. The court said (p. 205):

"If the general basis of an attorney breaks down, as in the case of Clark v. Board, no fact, no law, can save such a judgment."

steps as may be necessary for their protection. Appellant seems to be proceeding on the theory that he is not at all responsible for the negligence of his counsel. The very reverse of this is the law."

It will be observed that the "certificate" of the physician does not state for what ailment he was treating the attorney. It states that the attorney was confined to his home "a great deal of the time." As was pointed out in the Clark v. Wing case, supra, the attorney could have communicated with his client. It is apparent that defendant does not show that it exercised any diligence. The neglect of the attorney was the neglect of the client.

In view of our ruling that the defendant did not show diligence, it is unnecessary to discuss the contents of the affidavit of merits. Hence, we are of the opinion that the court was in error in vacating the default and judgment and in reinstating the cause.

The order of the Municipal court of Chicago, entered March 30, 1938, vacating the default and judgment of January 10, 1933, is reversed.

ORDER REVERSED.

Sullivan and Friend, JJ., concur.

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It was ...
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40425

WILLIAM H. WESTNEY,
Appellant,

v.

KENTUCKY MANUFACTURING CORPORATION,
INCORPORATED, a corporation,
Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

299 I.A. 609⁴

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On April 14, 1934, plaintiff filed his statement of claim in the Municipal court of Chicago and alleged that he purchased from defendant a motor truck trailer for \$1,475; that he paid thereon \$125 on September 11, 1933, and \$300 on October 11, 1933, and agreed to pay the balance in instalments of \$7.50 per month beginning November 11, 1933; that under the terms of the purchase plaintiff delivered to defendant a motor truck tractor owned by plaintiff, which defendant equipped with a device known as a "fifth wheel," which said "fifth wheel" was a device for the purpose of coupling the trailer to and uncoupling it from the tractor; that the "fifth wheel" was furnished and installed by defendant upon the trailer built by defendant and also upon the tractor of plaintiff; that plaintiff informed defendant that he intended to use the trailer to haul heavy freight; that it was defendant's duty to build and construct it so that it would be fit for the purpose for which it was purchased; that on November 29, 1933, plaintiff was driving his tractor, coupled to which was said trailer, on Route 52, in the State of Indiana, with due care for his own safety and the safety of said equipment, when by reason of the negligent and unskilled construction, tests and inspection the trailer and "fifth wheel" broke, collapsed and came apart; that by reason of the careless and negligent manner in which the "fifth wheel" and the coupling of the trailer were built and installed

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WASHINGTON, D. C. 20535

TO: DIRECTOR, FBI (100-388140) FROM: SAC, NEW YORK (100-100000) (P)

On April 16, 1964, Plaintiff filed the statement of claim in the Municipal Court of New York and alleged that he purchased from defendant a motor truck trailer for \$1,475; that he paid \$500 on September 11, 1963, and \$975 on October 11, 1963, and agreed to pay the balance in installments of \$87.50 per month beginning November 11, 1963; that under the terms of the purchase Plaintiff delivered to defendant a motor truck trailer owned by Plaintiff, which defendant equipped with a device known as a "fifth wheel," which said "fifth wheel" was a device for the purpose of coupling the trailer to and uncoupling it from the tractor; that the "fifth wheel" was furnished and installed by defendant upon the trailer with Plaintiff's consent and also upon the advice of Plaintiff; that Plaintiff informed defendant that he intended to use the trailer to haul heavy loads; that it was defendant's duty to verify and inspect the trailer to make sure it was fit for the purpose for which it was purchased; that on November 11, 1963, Plaintiff was driving his tractor, which was hitched to the trailer, on Route 91, in the State of Illinois, when the tractor hit two men and the contents of said equipment, which were in the trailer and which were being transported, and injured them by reason of the negligent and unskillful construction, design and inspection of the trailer and "fifth wheel" which were furnished and installed by defendant and Plaintiff's consent, negligence and active participation.

Plaintiff by reason of the carelessness and negligent manner in which the "fifth wheel" and the coupling of the trailer were built and installed

the coupling came apart; that by reason of the careless and unskilled manner in which the coupling pin was built on said trailer it broke and came apart; that because the coupling pin was carelessly and negligently made of light, poor and improper metal it broke and came apart; that by reason of the careless construction of said "fifth wheel" and coupling device they broke and came apart; that by reason of defective material and manufacture the flange or collar of the coupling pin broke and came apart; that defendant neglected to make proper inspection and tests before delivering the trailer and thereby overlooked defects in the "fifth wheel" and coupling device, which defects caused the coupling device to break and pull apart; that defendant made an express and an implied warranty that the trailer would be reasonably fit for the use and purpose for which it was intended; that the trailer failed to comply with the warranties; that on December 1, 1933, defendant took possession of the trailer and promised to repair and return the same to plaintiff on or before December 15, 1933; that on December 29, 1933, defendant fraudulently advised plaintiff to wait until later for clearance from the insurance company; that defendant converted the trailer to its own use by selling it on or about December 30, 1933; that on January 11, 1934, plaintiff discovered that the trailer had been sold; that defendant then promised to build another trailer for plaintiff; that plaintiff was damaged in the sum of \$227.06 for the repairs of the tractor; \$3,600 for the reasonable value of the loss of use of his trailer for 120 days at \$30 per day; \$425 "down payment" and \$87.50 first instalment paid, totaling \$512.50 payments made by plaintiff on the trailer; and exemplary and punitive damages in the sum of \$2,000. In its affidavit of merits defendant admitted that it was its duty to build and construct the motor trailer so that it would be reasonably fit for the purposes for which it was intended, that is, to haul and carry heavy freight for long distances while it was attached to the motor truck tractor; that the purposes for

The coupling was opened; the by action of the coupling and working
mechanism in which the coupling was being on which the coupling is broken
and some opened; that because the coupling was not completely and
legally made it likely, poor and dangerous metal & a broken and some
opened; that the coupling of the coupling mechanism of said "Tillie"
wheel and coupling device they broke and some opened and it was
of defective material and construction the flange on either of the
coupling was broken and some opened; that because the coupling was not
properly constructed and the coupling was broken and some opened
overlooked defects in the "Tillie" wheel and coupling device, which
defects caused the coupling device to break and some opened and some
Tombard made an examination and an inquiry with respect to the trailer would
be reasonably the fact the fact and purpose for which it was intended;
that the trailer failed to comply with the requirements; that on December
1, 1937, defendant took possession of the trailer and intended to re-
pair and return the same to plaintiff on or before December 15, 1937;
that on December 15, 1937, defendant took possession of the trailer and
will return the same to plaintiff on or before December 15, 1937;
and converted the trailer to his own use by selling it on or about
December 15, 1937; that on January 11, 1938, plaintiff discovered that
the trailer had been sold; that defendant then intended to sell
another trailer for plaintiff; that plaintiff was damaged by the sale
of 1937.00 for the purchase of the trailer; 12,000 for the reasonable
value of the loss of use of his trailer for 120 days at \$10 per day;
that the amount of \$12,000 was paid to plaintiff; that the amount of \$12,000
payments made by plaintiff on the trailer; and damages and interest
amount in the sum of \$2,000. In the affidavit of assets defendant
admitted that it was the duty to build and construct the motor trailer
so that it would be reasonably fit for the purpose for which it was
intended, that is, to haul and carry heavy loads for the purpose of
hauling it was intended to be used for the purpose of hauling heavy loads

which plaintiff required the trailer were known to defendant; that the trailer was built and constructed for the uses and purposes required; that there was an implied warranty that the trailer would be reasonably fit for the uses and purposes for which it was manufactured; denied that there was a breach of the warranty, and asserted that the trailer was properly built and constructed for the uses and purposes for which it was manufactured; alleged that plaintiff made default in the payment of the second and third instalments and in the payment of \$100 to defendant on account of "deductible insurance" by reason of the loss due to the accident; that plaintiff promised to pay the \$100 deductible insurance; that because of the defaults defendant repossessed the trailer after having declared the entire indebtedness due; that thereafter defendant offered to construct another trailer for plaintiff, which plaintiff declined; and defendant also denied that plaintiff was entitled to the damages claimed.

A recitation of the pleadings indicates that the defendant admits that it was its duty to manufacture and deliver to plaintiff a trailer that would carry heavy loads of freight along highways over long distances. Plaintiff maintains that the coupling pin was defectively constructed. The issue joined was as to whether the coupling pin was defectively constructed. The case was tried before a jury of six men, resulting in a verdict for plaintiff in the sum of \$1,200. The court sustained a motion by defendant for a judgment notwithstanding the verdict, and this appeal brings the record before us for review.

The first point urged by plaintiff is that in passing on the motion for a judgment notwithstanding the verdict it was the duty of the trial court to consider the evidence in its aspect most favorable to the plaintiff and that all reasonable inferences must be resolved most strongly in favor of the plaintiff. There is no substantial dispute as to the correctness of this statement of the law. The corollary of it, stated by defendant, is that where the evidence,

[illegible]

taken in its most favorable aspect from the viewpoint of plaintiff's case, together with all reasonable inferences, does not establish his case, it is the duty of the court to direct a verdict for the defendant. Therefore we examined the record with care, in order to determine whether there is any competent evidence to support the verdict.

Plaintiff, who had been employed as a pressman, decided to enter the trucking business. He testified that in August, 1933, he negotiated with F. H. Bartlett, a Chicago agent of the defendant corporation, for the purchase of a trailer. On September 11, 1933, he made a first payment of \$125 and signed an order for a trailer, which defendant was to manufacture according to the specifications of plaintiff. The purchase price was \$1,314.46. Added to that were items of \$60.00 for fire and theft and \$100 deductible collision insurance, and a finance fee of \$94.56, bringing the aggregate bill to the sum of \$1,475.62. Defendant's factory is located at Louisville, Kentucky, and on October 11, 1933, plaintiff went to Louisville to secure delivery of the trailer. There he then made an additional payment of \$300, which brought his total "down payment" to \$425, leaving a balance of \$1,050.62, and he signed a conditional sales contract and an instalment note providing for the payment of the balance of the debt in instalments of \$87.50 each month after October 11, 1933. The contract contained the usual provisions permitting the vendor to repossess and sell the trailer without notice in the event of default. Plaintiff testified that on November 1, 1933, he paid the instalment due November 11, 1933, making such payment to Mr. Bartlett in Chicago. He further testified that on November 29, 1933, at about 4 a.m., he was driving his truck, consisting of a tractor and the trailer purchased from defendant, in a northwesterly direction in the State of Indiana between Monroe and Lafayette, on his way to Chicago with a load of six or seven tons of printing paper; that he observed a truck coming in the opposite direction, "straddling the center line;" that he

slowed down to about ten miles an hour and pulled to the right so as to pass without a collision; that at the moment he pulled to the right he passed over a culvert; that when he went over the "soft spot" at the culvert he felt a jar; that he "pulled off to the right with my left wheels on the pavement and the right wheels on the gravel. All at once I felt an impact from behind that carried the tractor forward. I stopped. When I got out, the trailer was laying in the ditch. The tractor was on the highway. I did not have a collision with the vehicle coming in the opposite direction." He stated that the trailer was about two hundred yards away from the tractor at the time he stopped the tractor, and that "the road was even. Route 52 is a U. S. cement highway, double lane with a black line down the center and a gravel shoulder. The trailer was about 75 feet from the road on its right side, the whole right side of the trailer was crushed in. There was a very shallow ditch on the side of the road. The trailer was across the ditch and laying on the farm. The tractor was coupled with the trailer by a fifth wheel. This fifth wheel is put into the tractor for hooking the trailer into it. It looks like a horseshoe, and it works on a swivel, rocks backward and forward. It is constructed of steel. This fifth wheel was part of the trailer. There is also a pin that is a part of the coupling device. The pin is built into the nose of the trailer. There is a slot in the fifth wheel that this pin slides into and the coupling locks with a double lock on it. The trailer, in leaving the tractor, nosed over the right-hand side of the tractor and took the right running board and carried it. * * * The bottom of the pin was broken off from the nose of the trailer. It would still fit into the fifth wheel. The wrecking truck held it up while I backed under it and let it down into the safety catch of the fifth wheel. I wired it there so it couldn't lift out again. I used 10 or 15 feet of barbed wire which I got from the farmer. In that condition I drove to Chicago." He testified further

...down to about ten miles an hour and pulled to the right so
as to pass without a collision; that as the tractor was pulled to the
right he passed over a culvert; that when he went over the culvert
that the tractor hit the culvert in such a way that it hit the right
side of the culvert and the right wheel of the tractor
...the tractor was on the highway. I did not have a collision
with the vehicle coming in the opposite direction. He stated that
the tractor was about two hundred yards away from the tractor at the
time he passed the tractor, and that the road was over. Route 22
is a U. S. cement highway, twelve feet wide with a black line down the
center and a gravel shoulder. The tractor was about 75 feet from the
road on the right side, the whole right side of the tractor was
exposed. There was a very shallow ditch on the side of the road.
The tractor was across the ditch and laying on the bottom. The tractor
was coupled with the trailer by a fifth wheel. This fifth wheel is
put into the tractor for hooking the trailer into it. It looks like
a horseshoe, and it works on a spring, rockers and rollers.
It is constructed of steel. This fifth wheel was part of the tractor.
There is also a pin that is a part of the coupling device. The pin
is built into the nose of the trailer. When it is first in the fifth
wheel it fits into the pin and the coupling looks like a double
lock on it. The trailer, in leaving the tractor, goes over the
right-hand side of the tractor and took the right turning going and
around it. * * * The bottom of the pin was broken off from the nose
of the trailer. It was found that the fifth wheel was broken
...up after it backed under it and let it down into the
coupling catch of the fifth wheel. I think it broke so it couldn't lift
out again. I want to say that I backed mine which I got from the
factory. In that condition I drove to Chicago. The condition of the

that he arrived in Chicago the day before Thanksgiving day and left the truck at the plant of the International Harvester Company. On the day after Thanksgiving day he visited Mr. Bartlett at his office and related what had taken place. He showed Bartlett the bottom part of the pin of the coupling device. He stated that the entire pin weighed from twenty to twenty-five pounds and that the part that he showed to Bartlett weighed about one and one-half pounds; that he gave the part to Mr. Bartlett, who kept it; that witness did not see the part thereafter; that Bartlett told him that he wished to send the part, together with the trailer, to the plant of defendant in Kentucky in order to have the part analyzed. Witness testified that "I showed him a dark spot on one side of the pin. This part is a piece of steel. Steel is gray. The dark spot covered about one-third of the surface. I acquired some experience with steel while employed with the Sellers Manufacturing Company in Mayfair. The larger portion of the pin was fastened to the nose of the trailer. It is in the possession of the Kentucky Manufacturing Company;" that on December 1, 1933, at Bartlett's request, plaintiff ordered the trailer from the International Harvester Company and it was sent to the factory in Louisville; that it did not again come into possession of plaintiff; that after December 1, 1933, he called on Mr. Bartlett "a few times;" that the latter informed witness that the repairs would be completed in approximately fifteen days; that during the second week in December, before the second payment became due, he asked Bartlett what to do about the payment that was to come due on the 11th; that Bartlett told him, "Don't worry about that until your trailer is back here from Kentucky and we will settle all that at once;" that Bartlett told him that the trailer would not be back until the 20th, as there had been a delay in sending it out of Chicago; that the trailer was repaired in Louisville and returned to Chicago ^{on} December 22, 1933; that on January 5 or 6, 1934, witness saw his trailer in the stockyards hooked up to a

Dodge truck; that he had been going to see Bartlett every other day or so, asking when the trailer would be returned; that the latter kept telling him that the insurance company was withholding the release of the trailer; that on December 1, 1933, when he delivered the trailer to Bartlett the latter said, "don't worry about it, the insurance will cover all damages. I said well it is a \$100.00 deductible. He said well, you know those bills have always been adjusted. You won't have any worry about a \$100.00 deductible." Plaintiff testified that on January 9, 1934, he sent a telegram, drafted with the aid of his lawyer, to defendant at Louisville, Kentucky. The telegram read: "Your order thirteen two six four September eleventh stop You recently repaired trailer serial number thirty five naught one and sent to your representative P H Bartlett here stop Have tendered one hundred eighty seven dollars and fifty cents to Bartlett but delivery of trailer refused stop Kindly wire if refusal made on your instructions and if not wire myself and Bartlett so I can secure trailer at once stop Answer collect." Defendant replied with a telegram sent on January 10, 1934, reading: "See Mr. Bartlett reference your trailer He will handle." Plaintiff also received a letter from defendant dated Louisville, Kentucky, January 11, 1934, reading: "Confirming 'phone conversation with you of today, we have contacted our Mr. Bartlett and he has requested that we advise you to see him and he will handle the matter in a satisfactory manner." Plaintiff testified that he did not receive any money from the insurance company; that on January 10, 1934, he had a talk with Bartlett in regard to the delivery to him of another trailer; that at that time he knew his trailer had been sold. He also received a letter from defendant dated Louisville, Kentucky, January 19, 1934, informing him that because of a large number of losses the insurance company had canceled the policy of insurance and that for reasons set up therein there would be no refund on account of the cancellations. As an item of damage plaintiff claimed that he did not resume his former

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occupation as a pressman until the middle of February, 1934. On cross-examination he admitted signing the conditional sales contract. He said that at the time of the accident the highway was dry; that the incline to the right of the road over which the trailer moved after it left the tractor was about a foot below the level of the road "at the deepest." He said that two left wheels of the tractor were on the highway at all times and the two right wheels were on the gravel shoulder on the road; that "this fifth wheel is connected on the rear end of the tractor. The pin merely slides right into it and locks in. This part was broken off. I could still slide the other part of the pin into the tractor on the highway. * * * The purpose of the fifth wheel is to keep the trailer from lifting up;" that when he saw Mr. Bartlett on December 1, 1933, the latter told him that he was insured and that he would take care of settling the matter with defendant and the insurance company. He also admitted that on December 4, 1933, he made a written statement which he signed and delivered to a representative of the insurance company. The statement was introduced for the purpose of impeachment. He further testified that he offered to pay the December instalment on December 10 or 11 but Bartlett told him not to worry about the payment until the trailer came back to Chicago. He denied that Joseph P. Desmond, sales manager of defendant, demanded of him the payment of \$187.50; stated that he had had no previous experience with tractors or trailers. He testified that Bartlett offered him a replacement of a like trailer, which offer he refused; that two payments were due at the time the offer was made; that he was offered a "like trailer" on the payment of \$300. He also stated that on January 4, 1934, Bartlett told him that his trailer had been repossessed and sold under the terms of the conditional sales contract.

J. H. Rech, on behalf of defendant, testified that he was an adjuster; that on December 4, 1933, he interviewed plaintiff in reference to a claim for damages against the Hartford Fire Insurance Company;

operation as a business unit in the middle of 1933. The
operation was continued in 1934. The operation was continued.
He said that at the time of the operation the highway was very bad.
the machine to the right of the road over which the machine moved after
it left the tractor was about a foot below the level of the road and
the "geog." He said that the last witness of the tractor was on the
highway at all times and the two witness stands were on the ground
shoulder on the right side of the highway. The witness stands were on the right
end of the tractor. The witness stands were on the right side of the
road and were broken off. It would seem that the other part of the
machine into the tractor on the highway. The purpose of the fifth
witness is to keep the machine from falling off. That is what he was told.
Bartlett on December 1, 1933, the last witness stand was broken
and that he would take care of setting the tractor with the witness stand
the insurance company. He also testified that on December 1, 1933, he
made a written statement which he signed and delivered to a representative
of the insurance company. The statement was introduced for the
purpose of impeachment. He further testified that he signed to pay
the December installment on December 10 or 11 but Bartlett told him not
to worry about the payment until the tractor came back to Chicago. He
denied that Joseph F. Newman, sales manager of defendant, demanded of
him the payment of \$150. He stated that he had had no previous experience
with tractors or trailers. He testified that Newman offered him a
replacement of a like trailer, which offer he refused, that the pay-
ments were due at the time the offer was made; that he was offered a
"like trailer" on the payment of \$500. He also stated that on January
4, 1934, Bartlett told him that his trailer had been repossessed and
sold under the terms of his conditional sales contract.

J. H. Neely, on behalf of defendant, testified that he was an
adjuster; that on December 4, 1933, he interviewed Plaintiff in refer-
ence to a claim for damages against the National Fire Insurance Company.

that he asked him questions and that he wrote down the answers, and that plaintiff told him on December 4, 1933, that it was raining at the time of the accident and that at the time of the accident plaintiff was driving at a speed of twenty-five miles per hour; that he reduced the statement to writing, and that plaintiff read it, said it was correct, and signed it. Mark M. Allen, for defendant, testified that he was employed in the pay roll office of the Chicago Tribune; that witness brought to court the pay roll records and canceled checks of plaintiff; that plaintiff worked for the Tribune from February 3, 1925, until the year 1935, with the exception of a period of not quite three months in 1933, and produced a check to plaintiff, dated December 31, 1933, for two days' work performed by plaintiff for the Tribune; and he produced other checks for periods subsequent to December 31, 1933. Joseph P. Desmond, on behalf of defendant, testified that he was sales manager for defendant corporation; that in November, 1933, F. H. Bartlett was employed by defendant as sales agent; that witness saw plaintiff at defendant's Chicago office, at 3839 South Michigan boulevard, on December 21 or 22, 1933, and requested plaintiff to make a payment that was past due on the trailer in the sum of \$87.50, and also the sum of \$100 that was due for "deductible insurance;" that plaintiff said he would bring in the money the next day; that witness told plaintiff that he had made similar promises and had not fulfilled them, and that witness was giving plaintiff three days further in which to make the payments or defendant would have to repossess the trailer; that witness told plaintiff that if he would make the payments the repaired trailer would be brought from Louisville and delivered to him; that plaintiff did not offer any money to witness; that witness told plaintiff that the trailer had been repaired and was ready for delivery. F. H. Bartlett, a witness for defendant, testified that in September or October, 1933, he was the sales representative of defendant; that he took the order for the trailer,

which was to be manufactured according to specifications; that witness did not receive the \$87.50 which plaintiff claimed he had given to him on November 1, 1933; that witness received a letter, signed by plaintiff, dated November 22, 1933, and sent to him from Denver, which letter was admitted in evidence; that the letter states that plaintiff was "stranded in Denver waiting for a load back;" that the next time he heard from plaintiff was when he received a long distance telephone call the day before Thanksgiving, 1933, in which plaintiff "told me he wrecked the equipment;" that witness told plaintiff to come to Chicago; that the day after Thanksgiving the witness spoke to plaintiff, who gave him an order to pick up the trailer from a garage of the International Harvester Company; that witness had an outside man with a tractor bring the trailer to defendant's garage pending instructions from the insurance company; that at plaintiff's request he called up the insurance company; that pursuant to the call Mr. Nech, an adjuster, came; that plaintiff, in the presence of witness, talked to the adjuster; that witness was a metallurgical engineer; that he attended Armour Institute and Lewis Institute, both in Chicago; that after the accident plaintiff did not mention to witness ~~XXXXX~~ a defective "fifth wheel;" that plaintiff did not say anything about the pin; that plaintiff "told me the fifth wheel and the trailer broke away from each other. This collar was broken from the pin. It was a complete mechanical fracture as we term it. That means a tear. It was wrenched. No fracture whatever. It was clean. I examined the pin carefully. The color was gray. Westney did not mention any dark defective parts in that fifth wheel. I did not see any dark defective parts;" that the trailer went to Louisville the day after the insurance adjuster released it; that when it went to Louisville it was in the same condition as when it came in; that witness attached it to a tractor and sent it "on its way;" that he did not have to wire it up; that on December 21 or 22, 1933, witness was present at the

which was to be manufactured according to specifications; that
attorney did not receive the 1937. He which plaintiff claims he had
given to him on November 1, 1933; that attorney received a letter
signed by plaintiff, dated November 22, 1933, and sent to him from
Newark, which letter was admitted in evidence; that the letter stated
that plaintiff was "arrested" by New York waiting for a last check; that
the next time he heard from plaintiff was when he received a letter from
Newark telephone call the day before Thanksgiving, 1933, in which
plaintiff "told me he needed the equipment"; that witness told plaintiff
that he came to Chicago; that the day after Thanksgiving the witness
spoke to plaintiff, who gave him an order to pick up the trailer from
a garage of the International Harvester Company; that witness had an
outside man with a tractor bring the trailer to defendant's garage
pending instructions from the insurance company; that at plaintiff's
request he called up the insurance company; that pursuant to the call
Mr. Wood, an adjuster, came; that plaintiff, in the presence of wit-
ness, told him that the tractor was a 1937 International Harvester
model; that he also told witness that the tractor was a 1937
model; that after the accident plaintiff did not mention to witness
that the tractor was a 1937 model; that plaintiff did not say anything
about the fact that plaintiff told me the tractor was a 1937 model and the tractor
broke away from their other. This action was taken on the 1st of
May. A complete mechanical inspection was made on the 1st of May.
It was concluded. No tractor whatever. It was clear. It appeared the
girl carefully. The action was taken. Witness did not mention any date
defective parts in that tractor. It did not see any date defective
parts; that the tractor went to Louisville the day after the in-
surance adjuster released it; that when it went to Louisville it was in
the same condition as when it came but that witness stated it to
a tractor and sent it to the city; that he did not have to take it
up; that on November 21 or 22, 1933, witness and plaintiff had

time of the conversation testified about by Desmond. Witness corroborates the statement and testimony of Desmond in regard to the demand for payment of the \$87.50 and the \$100. Witness heard plaintiff tell Mr. Desmond that he would bring in the \$87.50 in two or three days, and heard Desmond tell plaintiff that the limit would be three days. Witness stated that the trailer was repossessed at the factory in Louisville and that they gave witness an order to sell it and witness sold it for \$1,000; that witness saw plaintiff on January 3 or 4, 1934, and at that time plaintiff knew that the trailer had been repossessed; that plaintiff at that time did not mention anything about making payments. Witness stated that "we offered him a new trailer that happened to come in that day or the day before without any change in the original contract to replace the original trailer that he had used two months, whatever it was, we would give him a brand new unit without any further obligation, except to pay the \$100.00 deductible plus \$87.50. He said he would let me know. I didn't see him after that. About April a man served a notice on me. The first time I ever heard about a claim for a defective pin was at the attorney's office." On cross-examination witness stated that he made an examination of the coupling pin in Chicago; that he had a laboratory test made of the pin and the collar. That the part that was broken off was sent to Louisville with the trailer. He further testified, "I can tell whether there is a defect in the pin by the fracture. This pin was not fractured, it was torn." Witness stated that the color of the steel in the pin was gray, "like all steel." At another point he said, "We have twenty-seven colors in steel." He stated that plaintiff did not mention any dark defective parts and that he did not see any black defective parts; that the trailer was not returned to Chicago until December 30 or 31; that it was delivered to the new purchaser on January 1, 1934; that the broken part of the pin was in the possession of witness for two or three

time of the conversation testified above by witness. Witness
corroborates the statement and testimony of witness in regard to
the demand for payment of the \$50.00 and the \$100.00. Witness
testified that on the day of the conversation, he was in the
two on three days, and having received both payments, that the first
would be three days. Witness stated that the parties were represented
at the Twenty in Louisville and that they gave witness an order to
sell it and witness sold it for \$100.00, that witness was present on
January 3 or 4, 1934, and at that time plaintiff told him that the dealer
had been represented; that plaintiff at that time did not mention any-
thing about making payments. Witness stated that "we offered him a
new dealer that happened to come in that day or the day before without
any change in the original contract to replace the original dealer
that he had used two months, whatever it was, we would give him a brand
new unit without any further obligation, except to pay the \$100.00
downright the \$50.00. He said he would let me know. I didn't see
him after that. About a week or two a notice came to me. The first
time I ever heard about a dealer for a detective was on the
"Twenty's office". In cross-examination witness stated that he
made an examination of the coupling pin in Chicago and that he had a
laboratory test made of the pin and the collar. That the test that
was broken off was sent to Louisville with the dealer. He further
testified, "I can tell whether there is a defect in the pin by the
fracture. This pin was not fractured. It was torn." Witness added
that the color of the steel in the pin was gray, "like all steel."
At another point he said, "We have twenty-seven colors in steel."
He stated that plaintiff did not mention any bank detective matter
and that he did not see any bank detective parties; that the dealer
was not returned to Chicago until December 30 or 31, that it was
evident at the time of the conversation of January 3, 1934, that the dealer
part of the pin was in the possession of witness for two or three

days before he sent it to Louisville; that witness saw it on the desk in Louisville for six months afterward; that it was not there at the time of the trial and that it was "thrown in scrap." Witness stated that he informed plaintiff several times that the trailer had been repossessed. Margaret Robinson, for defendant, testified, among other things, that on November 22, 1933, Reefer's Transit Company, which she owned, made out a check payable to the Kentucky Manufacturing Company in the sum of \$37.50. It was stipulated that in 1937 plaintiff asked for an order requiring defendant to produce "a certain portion of the coupling pin and the balance of the pin at the trial;" that defendant admitted that it received from plaintiff the broken portion of the pin and that at the time of the trial it had no knowledge as to where the part or parts of the coupling device were. By stipulation, a coupling pin "identical with the coupling pin which was on the trailer" was exhibited to the jury.

We have given an extensive summary of the evidence because the question involved is one of fact. Plaintiff argues that pure, good steel is gray, and that the broken pin disclosed a black spot covering about 1/3 of the surface. Hence, he maintains, there was a latent defect. Plaintiff himself attempted to qualify as an expert on steel. Even a cursory examination of his testimony reveals that he did not qualify as an expert on steel. Defendant insists that there is no evidence that would warrant a finding that the coupling pin was defectively constructed or constructed from a poor grade of steel, or from steel with a flaw. Plaintiff concedes that if there was nothing in the record but his own testimony regarding the color of pure steel, defendant's argument would be conclusive of the issue in the case. Plaintiff asserts, however, that P. H. Bartlett, a witness for defendant, who was qualified as a steel expert, "confirmed the fact that pure steel is gray in color." An examination of the testimony of Mr. Bartlett, an experienced metallurgical engineer, disclosed that he

... he was at the ...
... at the time of the ...
... stated that he ...
... other things, ...
... which she owned, ...
... Company in the ...
... asked for an order ...
... the coupling pin ...
... and admitted that ...
... pin and that at the ...
... the name of parts ...
... coupling pin ...
... was exhibited to the jury.

...
... question involved ...
... steel is gray, and ...
... about 1 1/2 of the ...
... defect. ...
... Even a ...
... directly as an ...
... testifies ...
... testifies ...
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... defendant's ...
... that ...
... and, who was ...
... two steel is ...
... Harbott, an ...

was of the opinion that the coupling pin showed that the break constituted a tear and not a fracture. At one point in his testimony he stated that steel is gray in color; however, when asked a specific question he said that there are twenty-seven colors in steel. He stated, positively, that he did not see any dark, or black, or defective part, and that plaintiff did not state to him at any time that there was any black, or dark, or defective part. The engineer stated, positively, that the color of the coupling was gray. There is nothing in Bartlett's testimony to support plaintiff's assertion that the coupling was in any way defective. It is worthy of note that when Mr. Bartlett was on the stand he was cross-examined by plaintiff, and answered that a laboratory test was made of the pin and collar, yet, plaintiff did not ask him what the laboratory test showed. Taking the testimony in its aspect most favorable to the contention of plaintiff, together with all reasonable inferences, we are impelled to the view that it does not establish the contention of plaintiff.

Plaintiff testified that he was traveling ten miles an hour. The statement that he gave to the insurance adjuster in the presence of another witness was to the effect that he was traveling at the rate of twenty-five miles an hour during a rain. While traveling at a speed of twenty-five miles an hour he swung over too far to the right and struck a soft spot in the shoulder of the road and the trailer broke loose and went into a ditch and turned over. The trailer was eighteen feet in length and was carrying, at the time of the accident, a load of seven tons. At the time of the accident plaintiff had been operating the truck (consisting of a tractor and the trailer) for about six weeks, and the truck had been in continuous operation, having proceeded on several long distance hauls. The fact that the accident happened does not authorize a presumption that the defendant was negligent. The burden was on plaintiff to prove by competent evidence, direct or circumstantial, that defendant was guilty of negligence in the

manufacture or assemblage of the trailer. This he has failed to do.

In view of plaintiff's contention that defendant should respond for all damages incurred, it is difficult to understand why plaintiff, in his telegram of January 9, 1934, tendered to defendant the sum of \$187.50 and demanded delivery of the trailer. That amount aggregated the instalment that fell due on December 11, 1933, plus the \$100 deductible insurance. If plaintiff was right in his contention that the accident was caused by a latent defect in the coupling pin, then there is no reason why plaintiff should suffer a loss of \$100. While plaintiff testified that he did not go back to work with the Tribune until the middle of February, 1934, the undisputed fact now is that he did go back to work on December 29, 1933. That is about the time the trailer was repossessed. He then refused the offer of defendant to deliver to him another trailer, giving him credit for the payments he had made. A reasonable inference is that plaintiff, realizing the difficulties encountered in achieving success in the trucking business, decided to abandon that business, and he accordingly returned to his former employment. We are of the opinion that there is no basis in the record for the damages found by the jury. The damages claimed are remote, and not supported by the evidence.

Plaintiff complains that the telegram and the letter from the defendant and the conversations with Mr. Bartlett after the trailer was repossessed, show a design to mislead plaintiff to his injury. The telegram of January 10, 1934, told plaintiff to see Mr. Bartlett in reference to "your trailer. He will handle," and the letter of January 11, 1934, advised plaintiff to "see him [Mr. Bartlett] and he will handle the matter in a satisfactory manner." At the time that the telegram and letter were sent, both parties knew that the trailer had been repossessed and sold to a stranger. The only reasonable construction to place on the telegram and letter is that Mr. Bartlett, defendant's agent at Chicago, was to discuss the matter with plaintiff.

As a matter of fact Mr. Bartlett did offer to deliver a new trailer, which was ready, and to give plaintiff credit on the payments that he had theretofore made. As we have seen, the offer was declined by plaintiff.

Plaintiff also points out that defendant threw away the piece of steel involved in the dispute, after defendant knew that the production of that piece of steel would be an important factor in the decision of the case. We do not believe that the evidence shows that the piece of steel was deliberately thrown away for the purpose of preventing its use in evidence. In any event, there is no evidence which establishes that the accident was caused by a latent defect.

Plaintiff contends that defendant could not repossess and sell the trailer without first returning the payments that he has made thereon, and cites Fidelity Light Co. v. Morrison, 203 Ill. App. 508, 910. The doctrine announced in that case cannot be applied to the factual situation before us. We have held that the record does not contain any evidence that the accident was caused by a latent defect. Therefore, at the time the trailer was sold plaintiff was in default in his payments under the conditional sales contract. Being in default and not having shown any valid reason why the instalment should not be paid, defendant was justified in repossessing and selling the trailer.

The trial court was right in sustaining the motion of defendant for a judgment notwithstanding the verdict. Therefore, the judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Sullivan and Friend, JJ., concur.

40430

EMMA L. MORRISSEY,
Appellee,

v.

RAYMOND L. MORRISSEY,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

299 I.A. 609⁵

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On May 28, 1938, plaintiff filed her statement of claim in the Municipal court of Chicago, in which she sought to recover from defendant the sum of \$975, based on an agreement attached to the complaint. The statement of claim, the agreement attached thereto, and all other proceedings had, are the same as in case Gen. No. 40346, except that the recovery here sought is for a later period.

Defendant prosecuted this appeal from the judgment entered and in this court the appeals were consolidated for hearing. The opinion filed concurrently herewith in case Gen. No. 40346 embraces the points raised herein. Therefore, the judgment of the Municipal court of Chicago is reversed, and the cause remanded, with directions to overrule plaintiff's motion to strike defendant's affidavit of defense, and for further proceedings not inconsistent with the opinion filed in the case of Emma L. Morrissey v. Raymond L. Morrissey, Gen. No. 40346.

REVERSED AND REMANDED,
WITH DIRECTIONS.

Sullivan and Friend, JJ., concur.

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40249

GEORGE A. BOBROWSKY,

Appellant,

vs.

BIRK BROS. BREWING CO.,
a corporation,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

299 I.A. 610¹

MR. PRESIDING JUSTICE MCCURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff, an attorney, appeals from a judgment in his favor for \$50, entered upon the verdict of a jury in a contract action wherein he alleged that he had been employed by and performed legal services for the defendant worth \$305. Defendant alleged that it had paid him all moneys due for his services.

Defendant corporation was a stockholder in the Rockford Brewing Company of Rockford, Illinois; Frank J. Birk, defendant's vice president and secretary, also was vice president and a director of the Rockford company; in September or October, 1936, believing the Rockford company would go into bankruptcy, he, acting for defendant, had several conferences with plaintiff, who was asked by Birk to acquire for defendant, by purchase from The Liquid Carbonic Corporation, the chattel mortgage on a bottling machine which had been sold by that corporation on a conditional sales contract (or chattel mortgage) to the Rockford company; after acquiring the mortgage plaintiff was to replevin the machine from the Rockford company in the name of Hugo Gests, the agent of defendant for that purpose.

Pursuant to this, plaintiff purchased at a discount, for about \$7300, the mortgage owned by The Liquid Carbonic Corporation and prepared to replevin the machine.

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1. The first of these is the fact that the Commission has not yet received any information from the Government of the United Kingdom regarding the progress of its investigation into the alleged activities of the British Security Services in the United States.

1. The first step in the process of identifying a potential threat is to determine the source of the information. This can be done by reviewing the information received from the source and determining if it is reliable. If the information is reliable, the next step is to determine the nature of the threat. This can be done by reviewing the information received from the source and determining if it is a threat to the organization's security. If the information is a threat to the organization's security, the next step is to determine the potential impact of the threat. This can be done by reviewing the information received from the source and determining if it is a threat to the organization's security. If the information is a threat to the organization's security, the next step is to determine the potential impact of the threat. This can be done by reviewing the information received from the source and determining if it is a threat to the organization's security.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United Kingdom regarding the progress of its investigation into the alleged activities of the British Intelligence Service in the United States.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the East (CLPE) in the United States.

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Mr. Birk testified that when plaintiff was originally hired, in September or October, 1936, Birk asked him what his fee would be, and when told \$300 Birk said that was high for an ordinary replevin, to which plaintiff replied that this was more or less complicated; Birk then said, "I will give you \$50 on account and \$250 more just as soon as you get title for us for this equipment," and that plaintiff agreed. A letter dated October 10, 1936, confirming this was received by plaintiff, in which Birk said, "I am enclosing a check in the amount of \$50 *** pertaining to the Liquid Carbonic matter. It is understood that this payment is in full, unless we obtain possession of the bottling unit located at the Rockford Brewing Company, at which time we will pay you an additional \$250.00." Birk testified that plaintiff was to "give us title to that machinery and we were to pay him \$300."

After plaintiff arrived in Rockford to replevin the machine he found that bankruptcy proceedings had been commenced against the Rockford Brewing Company; he filed a reclamation petition in that proceeding and then learned that the trustee in bankruptcy contended the chattel mortgage to The Liquid Carbonic Corporation, purchased by plaintiff for the defendant, was void because it was executed without authority of the board of directors of the Rockford Brewing Company. Facing this obstacle, plaintiff requested of Birk an additional \$200 as compensation for the extra work which he claimed was not contemplated in the original agreement. In the discussion Birk expressed disappointment in plaintiff, tried to bargain with him for only \$100 additional, and told plaintiff that he (Birk) had an agreement with him to "get title to that equipment for \$300," but finally, as defendant was anxious to get the equipment, Birk decided to pay plaintiff the additional \$200, totaling \$500. Plaintiff testified that his arrangement for fees at "that" time was "that for \$500 I was to see that the mortgage

that Birk Bros. Brewing Co. had bought from The Liquid Carbonic Corporation was recognized as valid."

Plaintiff was successful in upholding the validity of the chattel mortgage as against the contrary claim of the trustee in bankruptcy. This was on February 5, 1937. Plaintiff then sent defendant a bill for \$500, for services rendered "in handling Reclamation Petition as well as negotiations with The Liquid Carbonic Corporation, with Mr. Goetz, with the Trustee in bankruptcy." In defendant's statement of defense it admits the agreement to pay plaintiff \$500, and says it has paid him this in full settlement of all claims.

If the proceedings had terminated at this stage the present suit never would have been brought. However, plaintiff testified that about February 10, 1937, several days after the validity of the mortgage had been upheld by the referee in the bankruptcy case, both Birk and Goetz telephoned him and said, "the owner of the building won't let us take the machine..."

The Rockford Brewing Company did business in a building leased from Rockford Storage Warehouse Company, hereafter called landlord, then in receivership; the machine to be replevied from that building was about 8 feet wide, 25 feet long, 14 to 15 feet high and was located on the first floor, projecting through a hole into the second floor.

Plaintiff testified that within a day or two after the phone call above referred to, Birk came to his office, and at Birk's request and in his presence plaintiff phoned Thomas Gill of Rockford, the attorney for the trustee in the landlord proceedings, who said they did not care for the equipment but wanted a bond to guarantee that all damage done to the building on account of the removal would be repaired. He also wanted the opening in the floor of the second floor replaced. Shortly afterwards Gill prepared a

petition to force defendant to replace the floor and subsequently served plaintiff with a copy of the petition which he was going to file in a Rockford court on February 20th, claiming the machinery had become a part of the building because it was built in and could not be removed without serious damage to the building. Plaintiff said he told Birk they must be prepared for February 20th and that Goets must be in Rockford for the hearing; that Birk said, "by all means speed up matters"; that plaintiff told him a reclamation petition would speed up matters but that plaintiff could not do all this work without additional compensation. Plaintiff testified that nothing was said about the particular amount of fees to be charged in the landlord case, but as he recalled, Birk asked "How much are you going to charge me?" and plaintiff replied, "Depending on the amount of time expended," to which Birk replied that he would pay "what was right."

Plaintiff filed an answer and a reclamation petition in the Rockford landlord's proceeding and the matter was referred to a referee; three or four hearings were held in Rockford, two before the referee and one or two before the judge; plaintiff prepared a brief for the referee in this landlord matter and, being successful, Gill filed objections; plaintiff prepared another brief to meet these objections, and the referee's report sustaining plaintiff's position was later approved by the court. Judgment was entered recognizing that Goets's mortgage was superior to the landlord's lien. On the same day Birk was in plaintiff's office and was told what transpired. Afterwards the machine was delivered to defendant.

As to plaintiff's claim that on February 15, 1937, he was employed by defendant in the landlord case, where the landlord contended the machine had become part of the realty, Birk denied this employment, saying plaintiff was retained in 1936 to get title to the

equipment and there was no additional deal; he didn't recall having a talk with plaintiff about fighting the landlord's claim but said he had defendant's agent, Coets, either phone or call on plaintiff; Birk also said he didn't know about the specific suit entitled "Rockford Storage Warehouse"; however, he paid the bills to put the building back in shape. His testimony was to the effect that plaintiff was hired to get "title" to or "possession" of the machine. He used these two words interchangeably throughout his testimony. He said he was at no time interested in the legal procedure necessary to obtain the machine.

Plaintiff testified that he devoted 71 1/2 hours to what he referred to as the Rockford Storage Warehouse or "landlord" suit; that the reasonable, customary charge for such work in the United States Court is \$5 an hour, but that he made a flat charge of \$300, plus a \$5 expense, because Mr. Birk promised him other business from the defendant. This \$305 charge is the subject of this suit.

Defendant's brief asserts that plaintiff, while he rendered legal services in the landlord case, was not employed in any specific litigation, but was retained for the sole purpose of recovering for defendant the bottling equipment on the premises of the Rockford Brewing Company.

As stated above, the jury found in favor of plaintiff, but in assessing fees for his services, allowed him only \$50.

Defendant argues that because of the conflicting testimony the jury had the right and duty to judge the credibility of the witnesses and determine the facts and must have concluded that Birk was interested only in the recovery of the equipment and that he had no particular interest in the legal proceedings necessary to accomplish that end; also that the jury obviously gave more weight to Birk's testimony with reference to his denial of plaintiff's employment in the landlord case than it gave to plaintiff's testimony to the effect that Birk agreed to pay him "what was right" for his

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1. The following is a list of the names of the persons who have been appointed to the various committees of the Board of Directors of the American Telephone and Telegraph Company, for the year ending December 31, 1910:

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services in that case.

In Conrad Seign Breting Co. v. Peck, 68 Ill. App. 837, the plaintiff appealed from a judgment in his favor for \$100. His suit was based on a note for \$300 with interest, less an admitted credit of \$50 with interest. In reversing the judgment the court said:

"The verdict of \$100.00 finds no basis whatever in the evidence. ~~AND~~ the evidence in support of the defense went to the whole note and not to a part of it. There was no middle ground upon which the jury might compromise. Under the evidence appellant was either entitled to a verdict for the amount due upon the note, or was not entitled to recover at all.

So, when the jury found the issues in favor of appellant they found that appellant was entitled to a recovery, and they should have assessed its damages at the amount due upon the note. They could not rightfully say appellant was entitled to recover, but it should have only a fraction of what was due. Under the evidence all or nothing was due."

In Medley v. Chicago & N.W. Ry. Co., 48 Ill. App. 426, 428, the court said: "The jury found the injury was caused through the negligence of appellee in operating the train. Now they fixed the damages at \$100, when the undisputed evidence shows they exceeded \$400, is insolvable. ~~AND~~ If entitled to recover at all, appellant was entitled to a verdict for the full amount of his damages proven." In Calonepoulos v. Petropoulos, 147 Ill. App. 1, the plaintiff brought an action for \$500, having paid \$200 to the defendant to bind the bargain and \$300 which he claimed he paid on the following day; the verdict and judgment were for \$300; in commenting upon this the court said: "The evidence justifies a verdict and judgment for \$500 in favor of the plaintiff, or a verdict for the defendant. It is an action ex contractu, and if the jury were justified in finding against the defendant it should have been for \$500."

In the instant case the evidence in support of the defense went to the whole and not to a part of plaintiff's claim, based on the alleged contract for his services in the landlord case, entered into February 15, 1937. Plaintiff, if entitled to recover at all, should have recovered \$305, as his testimony as to the value of his services

is not contradicted. As was stated in Loroff v. White Eagle Brewing Co., 294 Ill. App. 37,40, "having found defendant liable for breaching its contract the jury should have, by simple computation, estimated the damages"

Defendant says that even if the verdict was the result of compromise, such a verdict for plaintiff will not be disturbed on this account, citing cases. In the cited cases the defendant appealed, whereas here the plaintiff complains. The courts have said that it is better policy to end litigation by sustaining a judgment for a smaller amount than was claimed and proved by the plaintiff, whenever the plaintiff is satisfied with it, than to prolong the strife by remanding the case for a new trial. Central Trust Co. v. Anglin, 194 Ill. App. 294, (not reported in full). Bernan v. Advance Terra Cotta Co., 211 Ill. App. 316, also involved an appeal by defendant. Rogers v. Weller, 187 Ill. App. 314, an action for a penalty, merely held that a compromise verdict was not involved where the amount "is within the range of the testimony of the witnesses as to value and is supported by some such testimony." In the instant case it is admitted that no contradictory evidence on the question of the value of plaintiff's services in the landlord case was presented by the defendant.

If plaintiff was entitled to recover under the facts as presented upon the trial he was entitled to recover the full amount claimed. "A jury has no right to render a capricious and arbitrary verdict in total disregard of the facts. A verdict should be consistent with at least some legitimate theory of the evidence, or what the evidence tends to prove, and must rest upon some sound principle; and where it is not warranted by any legitimate interpretation of the evidence, or of what may be fairly inferred from the evidence, it ought to be set aside." Conrad Seipp Brewing Co. v. Peck, 85 Ill. App. 637.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett and O'Connor, JJ., concur.

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With the least amount of effort, the following is a list of the most common types of errors found in the above mentioned reports.

Source: *Journal of the American Statistical Association*, 1997, 92, 1000-1010, 1001. Reprinted by permission of the American Statistical Association.

of a large number of small, separate plots of gas into the

Journal of Management Inquiry 24(1) 3-17

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39692

CITY NATIONAL BANK AND TRUST
COMPANY, a corporation, as trustee,
and CENTRAL REPUBLIC TRUST COMPANY,
a corporation, as trustee,

Appellants,

v.

WILLIAM H. EMERY,

Appellee.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

299 I.A. 610²

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiffs brought suit against William H. Emery upon an instrument of guaranty made by Mr. Emery together with certain other individuals, three of whom were appellees in cases numbered 39691, 39693 and 39694. The four cases were consolidated on appeal and opinions were filed in the three foregoing cases on November 17, 1938, reversing the judgments rendered in those cases and remanding them to the Superior court with directions.

On December 6, 1938, plaintiffs, through their counsel, suggested the death on October 23, 1938, of William H. Emery, and represented to this court that on November 28, 1938, letters of administration had issued by the Probate court of DuPage county to Marjorie W. Emery, as executrix under the last will and testament of her husband, and they moved that in accordance with Par. 216, sec. 92 (1) (b), of the Civil Practice Act (chap. 110, Illinois Revised Statutes 1937) an order of substitution of Marjorie W. Emery, as executrix, be entered in lieu of the defendant. That motion was allowed.

December 27, 1938, plaintiffs, through their counsel further moved the court to revive and continue the cause against Marjorie W. Emery, as executrix, without a change in the title of the case, and

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low income or individuals with mental health issues. (2010, p. 204)

to have not been the best of all to you - but even so

Received November 10, 1991; accepted for publication January 10, 1992.

Figure 1

to authorize the issuance of summons by the clerk of this court against her as executrix, commanding her to appear and show cause why the order and judgment of this court should not be entered against her as executrix. That motion was likewise allowed, and summons issued returnable to the 1939 February term of court.

February 2, 1939, Marjorie W. Emery, as executrix, by counsel, filed her appearance in response to the reire facias, denying that error had intervened in the record, proceedings or rendition of the judgment of the Superior court, and praying that it be affirmed.

The reasons set forth and conclusions reached in cause No. 39691 are controlling in this and the other consolidated proceedings. William H. Emery was the sole defendant in this cause, and since under the abatement statute (Illinois Revised Statutes 1937, chap. 1) and authorities construing it (Smith, Adm'x v. Wilmington Coal Mining & Mfg. Co., 83 Ill. 498; Estate of Weil, dec'd, 291 Ill. App. 208; Ols v. Scully, 296 Ill. 418; Keith v. Ray, 231 Ill. 213; U. S. ex rel. Wilhelm v. Chain, 300 U. S. 31; Williston on Contracts, 1932, vol. 6 sec. 1945, pp. 5449, 5450) contract actions survive, judgment should be entered herein the same as would have been rendered against William H. Emery. Accordingly, the judgment of the Superior court rendered in this cause is reversed and the cause is remanded with directions to enter judgment in favor of plaintiffs and against Marjorie W. Emery, as executrix under the last will and testament of William H. Emery, deceased, for the amount sued for, plus attorneys' fees, as provided in the instrument of guaranty, proof of which was expressly postponed until final determination of the cause.

JUDGMENT REVERSED, AND CAUSE REMANDED
WITH DIRECTIONS.

Burke, P. J., and Sullivan, J., concur.

40337

HAROLD R. JONES,
Appellant,

v.

PAUL J. LEITZELL,
Appellee.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

299 I.A. 610³

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Harold R. Jones appeals from a decree of the Superior court awarding Paul J. Leitzell, defendant, an attorney at law, \$1,923.49 for legal services rendered partially under a written agreement between Jones and Leitzell and also under an alleged oral contract for the partition of two parcels of real estate in which Jones had an interest as tenant in common with other heirs of his father's estate.

The essential facts disclose that plaintiff was the son and heir at law of Maxwell M. Jones, who died intestate January 29, 1928. as such heir plaintiff was entitled to 2/9ths of his father's estate. His mother was appointed administratrix shortly after the intestate's death, and proceeded to administer the estate from the date of her appointment until October 20, 1937, when she filed a final account. Her inventory as administratrix lists various stocks, bonds and securities of considerable value, but did not contain a parcel of real estate located at 3945 Ellis Avenue, Chicago, nor a cash item of \$1,981.10. During the nine year period of administration, the administratrix failed and apparently refused to file any current accounts, and plaintiff was unable to obtain any information from her regarding the assets, receipts on bonds or stocks or other income, although he made numerous requests.

On November 10, 1936, plaintiff retained Leitzell as his

WILLIAM E. JONES

WILLIAM E. JONES

WILLIAM E. JONES

WILLIAM E. JONES

William E. Jones appears from a review of the register book
 commencing Year 1, 1836, to have been, on January 1st, 1836, the
 for legal services rendered by him to the estate of
 between Jones and himself and also under an alleged oral contract
 for the partition of two parcels of real estate in which Jones had
 an interest as tenant in common with other holders of his father's

WILLIAM

The essential facts disclosed that plaintiff was the son and
 heir at law of William E. Jones, who died testate January 22, 1836.
 In such last plaintiff was entitled to 2/3rds of his father's estate,
 his mother was appointed administratrix thereof, that the defendant
 died, and proceeded to administer the estate from the date of her
 appointment until October 22, 1837, when she filed a final account.

For reasons to be stated in this account, Jones had
 acquiesced or considered value, but did not receive a parcel of
 real estate located at 20th Street, Chicago, and a cash item
 of \$1,211.10. During the nine year period of administration, the
 administratrix failed and negligently refused to file any account
 accounts, and plaintiff was unable to obtain any information from
 her regarding the estate, receipts on bonds or other items,
 although he made numerous requests.

On November 10, 1836, plaintiff received notice as the

attorney to represent him in obtaining an accounting and his share in the proceeds of his father's estate, under the following written agreement:

"To: Paul J. Leitzell,
111 W. Washington St.
Chicago, Illinois

This instrument does confirm my having engaged, commissioned, hired and appointed you as my attorney to represent me, personally, in all matters pertaining to my rights as the son and heir at law of Maxwell M. Jones, Deceased, whose estate is now pending in the Probate Court of Cook County, under the number appearing at the top thereof.

You are to receive for your services previously rendered and to be rendered in my behalf, an amount equal to 25% of any amount of cash or thing of value that I may receive as such heir from the estate of Maxwell M. Jones, Deceased, over and above any real or personal property heretofore inventoried in said estate.

Harold R. Jones

Approved Paul J. Leitzell,
Attorney."

Subsequently, in January, 1937, plaintiff requested defendant to file partition of a parcel of real estate at 4721-25 Langley avenue in Chicago, improved with an eight apartment building, and some time later plaintiff requested defendant to file another partition on the property at 3945 Ellis avenue, in both of which plaintiff had an interest as a tenant in common. Both partition suits were referred to masters and extensive hearings were had. The cases were prosecuted to the point where decrees of partition had been prepared, and were ready to be presented to the court for entry, when plaintiff and the other owners of the property decided to settle their differences so as to save expenses, and accordingly both proceedings were dismissed on plaintiff's motions. However, before dismissal, the court rereferred the causes to the respective masters for the purpose of fixing attorney's fees and costs, and they fixed the attorney's fees and expenses at \$1,323.40 in one case and \$1,209.40 in the other case, aggregating \$2,532.80.

It clearly appears that in the probate proceeding the administratrix and her daughter, Florence, plaintiff's sister, assumed a defiant attitude toward plaintiff, and failed and refused to render

in the presence of the following conditions, the following conditions are necessary and sufficient for the existence of a solution of the system of equations (1) in the form of a power series in the variables x_1, x_2, \dots, x_n :

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 under the provisions of the Act.

Approved: _____
R. J. [illegible]

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to separate and extensive business was had. The cases were investigated
thoroughly and a summary in German. Both questions which were referred
properly as well as the answer, in both of which English was used.

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is common to encourage the use of nonverbal evidence in the absence of direct evidence.

THE UNIVERSITY OF CHICAGO

It is clearly apparent that in the past the Government has been very lenient in its treatment of the Chinese people and that it has been very lenient in its treatment of the Chinese people.

the annual accounts required by statute during the nine years administration in the Probate court, and although plaintiff often sought and requested information regarding income on assets belonging to the estate, he was never able to obtain the same. In fact, the administratrix and his sister would not even discuss the matter with him. Consequently, after interminable delay, plaintiff sought and obtained the services of one or two attorneys and finally entered into the written contract hereinbefore set forth with Leitzell, who according to the decree appeared in court approximately on twenty different occasions to force the administratrix to close the estate, had many conferences with his client, the administratrix and her attorney regarding an accounting, examined many papers and reports from time to time, wrote approximately fifty letters to various companies pertaining to the stock held by the estate to determine the amount of dividends, if any, paid thereon during the period of administration, and in all devoted approximately 200 hours under his contract of employment. As a result of these services the administratrix, after a rule to show cause had been entered against her, and an attachment issued, filed her final account. This was procured entirely through the efforts of defendant, and as a result thereof plaintiff received a check for \$5,782.50, being his distributive share of the proceeds, after the deduction of certain expenses. This check was payable to plaintiff and defendant, the latter having theretofore served notice of an attorney's lien for the amount due him for services rendered in the Probate court proceeding. Plaintiff thereupon filed the complaint in this case to release the attorney's lien and cancel the check so that another might be issued to him. Leitzell answered and also filed a counterclaim, alleging there was due him \$3,806.18, for services rendered in all these matters, including the partition suits. The chancellor allowed defendant \$1,000 as attorney's fees in each partition proceeding, and also found that there was due

him \$108.48 for services under the written contract pertaining to the Probate court proceedings, representing 25% of the 2/9ths share of plaintiff in a cash item of \$1,951.10 which had not been inventoried by the administratrix. The decree found that after allowing credits for payments made by plaintiff and expenses incurred by defendant there was due the latter \$1,923.29, and that defendant had a lien on the \$5,782.50 check for this amount, and ordered payment thereof. Defendant served notice of a cross appeal, contending that the chancellor erred in the amount of attorney's fees allowed in each partition suit, claiming the full amount of the respective sums of \$1,323.40 and \$1,209.40, recommended by the masters, and that the court also erred in not allowing defendant the sum of \$1,446.62, being 25% of the amount recovered by plaintiff in the Probate court proceedings through the efforts of defendant under his written contract with Jones.

The principal controversy arises over the construction of the written contract. Plaintiff contends that the contract of employment applies to the partition suits as well as the services to be performed in the Probate court. Defendant, on the other hand, argues that the contract covered only the Probate court proceedings, and that the engagement to file the two partition suits was oral, separate and apart from the written agreement. The decree specifically found that "subsequent to the execution of the written contract ***, Jones requested and employed Leitzell to institute two partition suits ***, and that Leitzell did institute two partition suits (describing them by number) and rendered considerable valuable services in and *** prosecuting both of said cases to the point of the entry of the decree in each case." We think the contract is unambiguous, and that since the employment with reference to the partition suit was made long after the contract was entered into, there can be no question but that it was an independent and oral agreement and was not included

in the written undertaking. It is undisputed that in the course of the hearing the parties stipulated, among other things, that defendant rendered all the necessary services in connection with the partition suits, that they were completed to the point where decree was about to be entered in each case, and that they were dismissed on plaintiff's motion in order to save further expense, and that the reasonable and fair amounts due to Leitzell for services rendered in these proceedings were respectively \$1,323.40 and \$1,309.40, as found by the masters. Under the circumstances, and in view of the stipulation of the parties, we think the court erred in reducing the respective fees to \$1,000 each, and that defendant is entitled to the aggregate sum of \$2,532.80. A stipulation of the parties in a proceeding is generally held to be conclusive (City of Chicago v. Brexel, 141 Ill. 89; Brooks v. Ostrander, 153 Ill. App. 78; and Sulver v. Soule, 165 Ill. 417.)

With reference to the amount sought to be recovered by Leitzell in the Probate court proceeding, we are of opinion that defendant is entitled to recover only 25% of 2/9ths of the item of \$1,951.10, which was not inventoried by the administratrix, because it was through Leitzell's efforts that plaintiff's distributive share of this item was made available to him. The larger distributive share, of which Leitzell also claims 25%, was inventoried by the administratrix and ultimately would have been paid to Jones in any event. Therefore, the decree of the Superior court is reversed and the cause is remanded with directions that it be modified so that Leitzell be allowed the aggregate sum of \$2,532.80 for services rendered in the two partition suits; that he be paid 25% on 2/9ths of the item of \$1,951.10; and that after crediting Jones with the fees paid on account, and adding the expenses incurred by defendant, the decree fix the aggregate amount due Leitzell as indicated herein, and enter judgment thereon, and that the aggregate amount found to be due may be fixed as a lien on the \$5,782.50 check in Jones's possession.

DECREE REVERSED AND CAUSE REMANDED
WITH DIRECTIONS.

Burke, P. J., and Sullivan, J., concur.

40364

JACOB STANGLE,
Appellee,

v.

THOMAS MUSCATO, B. M. PATTON
et al.,
Defendants.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

299 I.A. 610⁴

ON APPEAL OF B. M. PATTON,
Appellant.

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Mrs. B. M. Patton appeals from an order of the Superior court denying her petition and motion to expunge from the court records certain orders entered, respectively, January 12, 1934, April 12, 1934, and November 20, 1934. The original suit arose out of the foreclosure of a trust deed securing payment of a note for \$4,000 on property at 6822 South Wood street, Chicago. A decree of foreclosure of the trust deed was entered December 19, 1932, sale of the premises was had January 13, 1933, and the report of sale and distribution by the master was approved January 23, 1933. No receiver was appointed to collect the deficiency reported by the master, but during the period of redemption Jacob Stangle, plaintiff in the foreclosure suit, collected the rents from the premises. The period of redemption expired April 14, 1934. Prior thereto Stangle filed a petition in the Superior court and had an order that his final account of the receipts and disbursements of the premises be approved and that the balance on hand be applied to payment of real estate taxes on the property. Another order entered in the Superior court November 20, 1934, provided that the receipts and disbursements of the premises foreclosed, as shown by Stangle's account from October,

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THE COURT, CHICAGO, ILL.

v.

THE COURT, CHICAGO, ILL.

IN FAVOR OF THE COURT, CHICAGO, ILL.

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1932, up to and including January, 1934, be approved and the balance on hand, of \$228.78, as shown by Stangle's report and account, be credited to the deficiency entered in his favor.

May 24, 1938, some four years later Mrs. Patton filed a petition in the Superior court reciting all the facts relating to the foreclosure proceeding, the sale of the premises, the report of sale and distribution by the master, the approval of same by the court, and praying that the court expunge from its records the several orders heretofore mentioned, on the ground that the court had lost jurisdiction of the cause and that the orders were null and void. Upon hearing, the court denied Mrs. Patton's motion, and she has prosecuted this appeal to reverse the order thus entered.

The question presented is whether the court had jurisdiction during the period of redemption to enter the several orders complained of by petitioner. Although the original decree of foreclosure did not reserve jurisdiction for any purpose, the order approving the master's report of sale and distribution found a deficiency due Stangle, amounting to \$964.10, and it awarded him "a lien upon the rents, issues and profits arising from the said real estate described in said decree during the full fifteen months' statutory period of redemption as provided for by law for the full amount of said deficiency," and he was authorized by said decree "to collect the rents, issues and profits arising from said real estate described in said decree, during the full fifteen months' statutory period of redemption, as provided for by law and for the full amount of said deficiency ***." The decree of sale and distribution also found that the rents, issues and profits of the premises conveyed by the trust deed were pledged as security for the payment of the indebtedness secured thereby, and the court retained jurisdiction in said order or decree "of this cause and the rents, issues and profits of said premises,

1932, up to and including January, 1934, he received and the balance on hand, of \$285.75, as shown by the report and account, he credited to the deficiency account in the favor.

On May 11, 1934, the court ordered that the report be

petition in the Superior Court respecting all the facts relating to the foreclosure proceedings, the sale of the premises, the report of sale and distribution by the master, the approval of same by the court, and praying that the court expunge from the records the several orders heretofore mentioned, on the ground that the court had lost jurisdiction of the cause and that the orders were null and void. Upon hearing, the court denied Mrs. Nelson's motion, and she has prosecuted this appeal to reverse the order thus entered. The question presented is whether the court had jurisdiction during the period of redemption to enter the several orders mentioned of by petitioner. Although the original decree of foreclosure did not reserve jurisdiction for any purpose, the order approving the master's report of sale and distribution found a default upon the mortgage, amounting to \$304.10, and it awarded him a lien upon the rents, issues and profits arising from the said real estate described in said decree during the full fifteen months' statutory period of redemption as provided for by law for the full amount of said debt, clearly, and he was authorized by said decree to collect the same, issues and profits arising from said real estate described in said decree, during the full fifteen months' statutory period of redemption as provided for by law and for the full amount of said debt, clearly. The decree of sale and distribution also found that the rents, issues and profits of the premises conveyed by the first deed were pledged as security for the payment of the indebtedness secured by this cause and the rents, issues and profits of said premises,

for the purpose of satisfying such deficiency out of said rents, issues and profits thereof by the appointment of a receiver or otherwise."

The law is well settled that during the period of redemption the rents from the premises belong to the owner of the equity, unless they are sequestered through the appointment of a receiver or some other disposition thereof is made in the decree. (Lightcap v. Bradley, 186 Ill. 510.) The trust deed foreclosed contained the usual provision pledging the rents, issues and profits as additional security for the payment of the debt, and when the master's sale left a deficiency, plaintiff would have been entitled to the appointment of a receiver to collect the rents and apply them toward the deficiency. No receiver was appointed, however, but in lieu thereof the decree of sale and distribution found a lien in Stangle on the rents, issues and profits to the extent of \$964.10, during the full fifteen months' statutory period of redemption, and it was obviously intended that he should go into possession and collect the rents to make up the deficiency. Having done so, he would be accountable to the court for receipts and disbursements, just the same as a receiver would have been. The language of the decree of sale and distribution evidently contemplated such an arrangement, and Stangle, having collected the rents, made his report to the court and had the court's approval of his accounting during the redemption period. We think the decree of sale and distribution sufficiently reserved jurisdiction in the court to pass upon Stangle's accounts, but even without specific reservation for that purpose, courts always retain jurisdiction to give effect to their decrees (First National Bank of Chicago v. Bryn Mawr Building Corp., 283 Ill. App. 267; affirmed in 365 Ill. 409), and since Stangle was given a lien on the rents, issues and profits and was thereby authorized to collect the same, it would naturally follow

that the court would have jurisdiction within the redemption period to pass upon his receipts and expenditures and enter orders either approving, disapproving or modifying them.

For the reasons given we are of the opinion that the order of the Superior court of June 23, 1938, denying petitioner's motion to expunge the several orders from the record, should be affirmed and it is so ordered.

AFFIRMED.

Burke, P. J., and Sullivan, J., concur.

that the court would have jurisdiction within the jurisdiction
period to pass upon the receipt and expenditure and other

items of the account, as stated in the account.

Now the respondent gives us one of the opinions that the
order of the Superior Court of June 22, 1933, denying petitioner's
motion to change the several orders from the record, should be
affirmed and it is so ordered.

WITNESSES:

James E. J. and William J. Jones.

ALEXANDER H. SPITZ,
Appellee,

vs.

A. H. KARATHIEN,
Appellant.APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

99914.611

MR. JUSTICE HATCHETT DELIVERED THE OPINION OF THE COURT.

In an action on a contract (fourth class) upon trial by the court there was a finding for plaintiff for \$252 with judgment, from which defendant appeals. The suit was for services as an architect and in drafting plans for the erection of a gas filling station in Chicago. The plaintiff testified in substance that defendant employed him to draft the plans and take charge of the construction of the building for the usual compensation of 6% of the cost of construction, which was \$5450. Defendant did not permit plaintiff to superintend the construction; his claim was therefore reduced according to the usual custom under such circumstances. Defendant testified plaintiff agreed to draft several plans or sketches to be submitted to him for his approval or rejection, and that if the plans were satisfactory he was to pay; if not satisfactory there would be no charge. Defendant argues for reversal because he rejected the plans, being the sole judge of whether the plans were satisfactory. He cites authorities from Goodrich v. Van Nortwick, 43 Ill., 445, to Union League Club v. Blymeyer Ice Machine Co., 204 Ill., 117, to the effect that where one agrees to render services satisfactory to another party, he may not recover therefor on the theory that someone other than the person contracted with is satisfied. It will not be necessary to discuss this doctrine with its refinements and distinctions. The parties disagree as to what the contract in fact was. The evidence is conflicting on all issues. In the trial court the burden of proof was on the plaintiff. The

THE UNITED STATES DEPARTMENT OF JUSTICE

In an action on a contract (written lease) upon trial by the court there was a finding for plaintiff for \$200 with judgment, from which defendant appealed. The suit was for services as an architect and in drawing plans for the erection of a gas filling station in Chicago. The plaintiff testified in substance that defendant employed him to draw the plans and this contract of the construction of the building for the usual compensation of 5% of the cost of construction, which was \$4000. Defendant did not admit plaintiff's testimony regarding the construction; his claim was therefore reduced according to the usual custom under such circumstances. Defendant testified plaintiff agreed to draw several plans or sketches to be submitted to him for his approval or rejection, and that if the plans were satisfactory he was to pay; if not satisfactory there would be no charge. Defendant agrees for reversal because he rejected the plans, being the sole judge of whether the plans were satisfactory. He cites authorities from Woodward v. Van Hook, 43 Ill. 445, to Union Pacific R.R. v. Sawyer Ice Machine Co., 204 Ill. 117, in the latter case where it was held that plaintiff's testimony is not binding, as the defendant is entitled to reject the plans and submit new ones. It will not be necessary to discuss this doctrine with the defendant and his witnesses. The parties disagree as to what the contract in fact was. The evidence is conflicting on all issues.

trial was by the court. The finding of the trial court upon appeal to this court is entitled to the same weight as the verdict of a jury. The controlling question is raised by defendant's contention that the finding and judgment are clearly and manifestly against the weight of the evidence.

The evidence shows plaintiff is a licensed architect; defendant, operating several gas filling stations, contemplated the erection of another to be located just across the street from another station owned and operated by him. The matter of plans was taken up between plaintiff and defendant about the first week of July, 1937. Defendant says he told plaintiff, "I want a duplicate of this station I am operating now. That all I want is the plans according to this old station so I can get a permit." Defendant says plaintiff suggested something "bright and different," but defendant said he wanted the "identical" thing for the new station with the canopy left off. Defendant says he said, "I have to have it so I can get a permit"; that plaintiff urged the new station should be built of porcelain steel enamel and said he would prepare a plan; "If you don't like it, all right. You don't have to give me a nickel," to which defendant said, "All right, if you want to do that, go ahead."

Defendant also testified he afterward went with plaintiff to the plant of the Porcelain Steel Enamel company where an estimate was given of the cost of such a building as plaintiff recommended. Defendant says he refused to go ahead on that plan and said he wanted a plan according to the old building. Defendant says that at this time only extension sketches had been made; he says plaintiff persisted, saying the building could be constructed of porcelain steel enamel cheaper than of brick, terra cotta or anything else.

Plaintiff says that about July 8 or 9 defendant came to his office and asked how soon he could get the plans. Plaintiff told

him he would submit several sketches so defendant could select a design; he prepared sketches which a day or two later defendant approved, saying, "Fine," and that plaintiff should go ahead. Plaintiff says that about July 15 he talked with defendant and told him the plans would be ready next day; defendant told him to deliver the plans at the Narragansett hotel where he lived, and next day (plaintiff says) he left four blue prints with specifications at the hotel for defendant. Plaintiff says that on July 17 defendant came to his office for more blue prints, which were given; he asked plaintiff to "hurry up and get the figures in." Defendant testified that no blue prints were delivered to him at the hotel and that he never saw the blue prints until August 9, when plaintiff brought them to his filling station with a bill for \$252, which he refused to pay. Plaintiff says defendant offered to pay him \$50 for the plans, which he refused to accept.

Construction was begun August 3; the building was finished about the middle of November. Defendant says that on August 10 he employed an architect named Wagline to draw plans. Plaintiff testifies that on August 8 he saw his plan being used on the job. Mr. Goldstein, the plumber, testified he used the Spitz plans and specifications. Mr. Kashbare was the general contractor. Goldstein says the Spitz plan was the only plan used and other plans were drawn afterward to get a permit. Mr. Kaeppel, manager of the Northwestern Terra Cotta company from which the terra cotta was purchased, identified shop drawings in two sheets showing the exterior and interior of the building as having been made under his supervision. Kaeppel said these plans were prepared with the help of the Spitz drawings; their draftsman, Mr. Anderson, went out and measured the old gas station and the figures came from these sources. Kaeppel says the Spitz plans were sufficient basis for an estimate. Defendant requested Anderson to take measurements of the old gas station because

him he would submit several questions as to whether or not he could accept
design; he proposed answers which he gave on two later occasions.
approves, saying, "fine," and a few minutes later he says
Plaintiff says that about July 15 he talked with defendant and told
him the plans would be ready next day; defendant told him to deliver
the plans at the Westchester Hotel where he lived, and next day
(plaintiff says) he took four blue prints with a reproduction of
the hotel for defendant. Plaintiff says that on July 17 defendant
came to his office for more blue prints, which were given; he asked
plaintiff to "hurry up and get the things in." Defendant testified
that no blue prints were delivered to him at the hotel and that he
never saw the blue prints until August 9, when plaintiff brought
them to his building station with a bill for \$25.25, which he refused to
pay. Plaintiff says defendant offered to pay him \$50 for the
plans, which he refused to accept.
consideration as August 2; the building was finished
about the middle of November. Defendant says that on August 10 he
employed an architect named William G. Brown. Plaintiff testi-
fies that on August 2 he saw the plan being used on the lot. Mr.
Goldstein, the plumber, testified he used the blue plans and speci-
fications. Mr. Kaufman was the general contractor. Goldstein says
the blue plan was the only plan used and other plans were drawn
afterward to get a permit. Mr. Leopold, manager of the Northwestern
Lumber Sales Company, says that the plans were used in the building
and that he saw the plans in the office of the architect. He testified
of the building as having been made under his supervision. Leopold
said there were three copies of the plans at the office of the
architect. Mr. Kaufman, who sold and delivered the plans to
defendant, said that the plans were then given to the
building and the latter were then given to the architect. The
plans were then given to the architect. The plans were then
given to the architect to be used in the building.

he wanted it duplicated. Kaepffel says, "We made blue prints from an architect's drawings; the terra cotta was made from Anderson's measurements and architect's drawings." Anderson testified he took measurements at the request of defendant; he says he borrowed plans from and returned them to Spitz; he says defendant did not tell him to do this. Silver (the electrical contractor) says he did not have any plans or specifications; wrote his own from the building across the street; his contract was with Kashbare. Kashbare testified he never saw Spitz's plans on the job; the plans used were drawn by Mr. Wagline about the middle of August. Kashbare, however, saw the Spitz drawings at the office of Mr. Spitz about the middle of August and he says he had possession of them for three or four days; the Wagline plans, he says, were completed about August 25. These plans, approved by the Department of Public Works on October 13, 1937, are in evidence. The plaintiff points out (defendant not contending otherwise) that the Wagline plans are an exact duplicate of the Spitz plans.

Defendant produced a picture of the building erected, and the following colloquy between court and counsel occurred:

"Mr. Goodnow: Here is a picture of the building. The Court: It looks like he has copied these plans absolutely. Mr. Goodnow: All he wanted was a copy of the old one. He didn't want anything new. He didn't want any tile. He didn't want anything. The Court: He used the man's plans, didn't he? Mr. Goodnow: No, he did not."

The defendant, Marrettick, testified that the new set of plans did not have a canopy or sign and that at the time he proceeded with the construction of the building he didn't have a permit.

In the testimony of Anderson appears the following:

"The Court: The whole lay out, the design of it, the portrait alongside of the plans, they are the same plans, aren't they?

A. No.***** The Court: ***** I want to know if this is about

he wanted it identified. Another says, "We saw him and the man
on a sidewalk's sidewalk; the man was with him. The man was
messengers and a witness's drawings." Anderson testified he took
statements at the request of the witness; he says he showed him
from and returned him to the witness; he says defendant told him
to do this. Silver (the electrical contractor) says he did not have
any signs or identification; what he saw from the witness, however,
the street; his contract was with Anderson. Anderson testified he
never saw White's sign on the job; the signs were taken from by
Mr. Wagline about the middle of August. Anderson, however, saw the
White drawings at the office of Mr. White about the middle of August
and he says he had possession of them for some or four days; the

drawings were taken from him by Anderson on October 15, 1937, and
approved by the Board of Public Works on October 15, 1937, and
in evidence. The defendant called out (defendant not containing
otherwise) and the witness signs are on street in front of the

defendant produced a picture of the building erected, and
the witness signs were taken from him.

Mr. Goodnow: Here is a picture of the building. The court: If
looks like he has copied from the photograph. Mr. Goodnow: All
he wanted was a copy of the old one. He didn't want anything new.
He didn't want any sign. He didn't want anything. The court: If
used the man's signs, didn't he? Mr. Goodnow: No, he didn't.

The defendant, mentioned, admitted that he had one of
plans did not have a canopy or sign and that at the time he proceeded
with the construction of the building he didn't have a permit.

In the testimony of Anderson appears the following:
"The Court: The whole lay out, the design of it, the permits
alongside of the signs, they are the same signs, aren't they?
The Court: I want to know if you know it was at about

the same as that. You don't say so, but it is obvious it is, and any blind man can see that, too. ***** Mr. Goodnow: In view of the fact that Marrettick always said and testified that he wanted a duplicate of the building across the street. That's all there was to it, - a building - a duplicate of the building across the street. A. That is what he told me when I went out there.*****

The Court: You mean to say those two buildings look alike?

A. The only difference is these windows are shorter. Q. Will you answer my question. Do the two buildings look alike? A. No.

Q. One looks like the drawing? A. All right. Q. The building he built looks like the drawing, doesn't it? A. Yes. Q. Doesn't look like the building across the street at all. A. It is the same sized building, the same length. Q. I didn't ask you that.

A. The only thing different are the windows. Q. I don't -- if you don't want to answer what I ask you -- A. I answered you.

Mr. Spitz: Are you through with him, Judge? Mr. Goodnow: Yes."

Mr. Kashbare testifies he was in Mr. Spitz's office in the middle of July for the purpose of picking up a plan and specifications and that he was there alone. He first saw the Spitz drawings around the latter part of July before he started the foundation. He says, "I had them four or five days. I'm not sure, I suppose Wagline got his ideas out of somebody's plans." Wagline was not called as a witness.

It is apparent the trial Judge was of opinion defendant used Spitz's plans in constructing the building to an extent which amounted to acceptance. The trial Judge saw and heard the witnesses. The question is whether his finding is clearly and manifestly wrong. We cannot hold it is.

The judgment is affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

the same as that. You don't say so, it is obvious it is, and
any blind man can see that, too. Now, the question is, in view of
the fact that the witness did not see the building, how can he
be a duplicate of the building across the street. There's all wrong
was so it, - a building - a duplicate of the building across the
street. At that is what he told me when I went out there.

The Court: You mean to say there are buildings back there?
A. The only difference is these windows are smaller. A. Will you
answer my question. Do the two buildings look alike? A. No.

A. But I don't see the windows. A. No, I don't. A. But I don't
see the building like the drawing, does it? A. Yes. A. Does it
look like the building across the street at all. A. It is the same
kind building, the same length. A. I didn't see that.

A. The only thing different are the windows. A. I don't see it.
Q. You don't want to answer what I ask you -- A. I answered you.

A. I don't see the building. A. No, I don't. A. But I don't
see the building like the drawing, does it? A. Yes. A. Does it
look like the building across the street at all. A. It is the same
kind building, the same length. A. I didn't see that.

Q. I don't see the building. A. No, I don't. A. But I don't
see the building like the drawing, does it? A. Yes. A. Does it
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kind building, the same length. A. I didn't see that.

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see the building like the drawing, does it? A. Yes. A. Does it
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see the building like the drawing, does it? A. Yes. A. Does it
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kind building, the same length. A. I didn't see that.

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kind building, the same length. A. I didn't see that.

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see the building like the drawing, does it? A. Yes. A. Does it
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kind building, the same length. A. I didn't see that.

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kind building, the same length. A. I didn't see that.

Q. I don't see the building. A. No, I don't. A. But I don't
see the building like the drawing, does it? A. Yes. A. Does it
look like the building across the street at all. A. It is the same
kind building, the same length. A. I didn't see that.

STANLEY SLOMSKI, doing business
as Archer Grocery,

Appellee,

vs.

E. SWIERENGA and ROBERT SWIERENGA,
doing business as Swierenga Bros.,
Appellants.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

299 I.A. 611

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Defendants appeal from a judgment in the sum of \$183.14 entered on the finding of the court in an action on contract of the fourth class. The statement of claim averred that June 7, 1937, defendants received from plaintiff \$228.74 in payment for merchandise to be thereafter delivered upon request; that plaintiff requested delivery or return of the money paid, which defendants refused. The statement was verified. The affidavit of merits (also verified) denied receiving the money for any purpose; denied any agreement to deliver the merchandise or to refund any money to the plaintiff because, as the affidavit stated, defendants "have not received anything from the plaintiff nor have they ever entered into a contract for the sale of goods with future delivery."

Defendants contend the judgment should be reversed because they were denied their rights in that they were not allowed to introduce any evidence and in that their attorney was not permitted to cross-examine plaintiff. A careful examination of the record discloses these charges are not sustained. Attorneys for defendants as a matter of fact cross-examined plaintiff, who was the only witness in the case. Defendants offered no evidence and produced no witness. No request by them for leave to introduce evidence was denied. Attorney for defendants suggested a continuance until evidence might be obtained but made no motion therefor nor any showing which would justify a continuance. Moreover, attorney

Produced Pursuant to Court Order

U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA
In re: [illegible]

MR. JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT

Defendants appeal from a judgment in the sum of \$28,144 entered on the finding of the court in an action on contract of the fourth class. The statement of claim averred that June 7, 1937, defendants received from plaintiff \$28,144 in payment for merchandise to be thereafter delivered upon request; that plaintiff requested delivery or return of the money paid, which defendants refused. The statement was verified. The affidavit of merits (also verified) denied receiving the money for any purpose; denied any agreement to deliver the merchandise or to return any money to the plaintiff because, as the affidavit stated, defendants "have not received anything from the plaintiff nor have they ever entered into a contract for the sale of goods with future delivery." Defendants contend the judgment should be reversed because they were denied in its rights in that they were not allowed to introduce any evidence and in that their attorney was not permitted to cross-examine plaintiff. A careful examination of the record discloses these charges are not sustained. Apparently for defendants as a matter of fact cross-examined plaintiff, who was the only witness in the case. Defendants offered no evidence and produced no witness. No request by them for leave to introduce evidence was denied. Although the defendants requested a continuance in all evidence might be obtained but made no motion therefor nor any showing which would justify a continuance. Moreover, attorney

for defendants stated facts claimed to constitute a defense which the court in deciding the case assumed to be true. Nothing occurred in the trial which infringed on defendants' constitutional rights or amounted to a denial of due process.

Defendants next argue for reversal on the ground the case proved by the evidence was not the case alleged in the pleadings. Plaintiff's demand was for \$228.74; the judgment was for \$183.14. The statement of claim averred a transaction on June 7, 1937. The proof showed transactions on that day and about but not actually on that day. No question of variance was raised either by objection to the evidence when offered or by motion at the close of the evidence. There was no material variance, but if there had been the question is not preserved for review. Moreover, in an action on a contract of the fourth class a case is whatever the proofs make it. Morse Hubbard Co. v. Mich. Central R. Co., 286 Ill. App., 163; 3 N.E. 2nd 93. Wanless v. Peabody Coal Co., 294 Ill. App. 401, 421, cited is easily distinguishable.

Defendants further contend plaintiff failed to make out a prima facie case. The evidence showed defendants were wholesale dealers in fruits, vegetables and similar merchandise and plaintiff was a retailer of the same. Defendants employed as a driver of one of their trucks a man named French, with whom plaintiff for some time had been accustomed to deal and who, it is agreed absconded June 9, 1937. Although it was not set up in the affidavit of merits, defendants undertook to interpose the defense that transactions to which plaintiff testified, whereby he bought and paid for goods to be delivered in the future, were so far as French was concerned without authority. Although not set up in the answer, defendants were permitted to interpose this defense without objection. They now cite Merchants' National Bank v. Nichols & Co., 223 Ill., 41; Murray v. Standard Pecan Co., 309 Ill., 226; and Kusek v. Allied Packers, Inc., 246 Ill. App. 209,

for defendant stated facts of which no complaint was made with the court in deciding the case seemed to be true. Nothing occurred in the trial which infringed on defendant's constitutional rights or amounted to a denial of due process.

Defendant next argued for reversal on the ground the case proved by the evidence was not one case alleged in the pleading. Plaintiff's demand was for \$250.00; the judgment was for \$150.00. The statement of claim averred a transaction on June 5, 1937. The proof showed transactions on that day and about that not actually on that day. No question of variance was raised either by objection to the evidence when offered or by motion at the close of the trial. There was no material variance, but it there had been the question is not preserved for review. Moreover, in an action of a contract of the kind a case is whether the proof made in

Waters v. W. W. W. Co., 285 Ill. App. 2d, 133; 3

Defendant further contended plaintiff failed to prove the prima facie case. The evidence showed defendant was wholesale dealer in fruits, vegetables and similar merchandise and plaintiff was a retailer of the same. Defendant employed as a driver of one of their trucks a man named French, with whom plaintiff for some time had been accustomed to deal and who, it is alleged, absconded June 9, 1937. Although it was not set up in the affidavit of merits, defendant undertook to introduce the defense that transactions to which plaintiff testified, whereby he bought and paid for goods to be delivered in the future, were so far as French was concerned without authority. Although not set up in the pleadings, defendant was permitted to introduce this defense without objection. They now cite Waters v. W. W. W. Co., 285 Ill. App. 2d, 133; 3

to the effect that persons dealing with an assumed agent must at their peril ascertain the fact of his agency and the extent of his authority. Here the fact of his agency was admitted. The only question is the extent of the authority of the agent. The record shows he was authorized to sell, collect, receipt and deliver and to accept checks to the order of defendants. Defendants were bound not only by his actual but apparent authority. Under the evidence the issue presented was of fact on which the finding of the trial court was for plaintiff. This finding in that court is entitled to the same weight as the verdict of a jury. Moreover, the proofs and the pleadings here show defendant received plaintiff's money and refused either to deliver the goods or return it. Defendants cannot be heard to deny authority of their agent while they retain the money which the agent received for them in transactions with the plaintiff. Defendants say that as to an item of \$24.64 cash, included in the court's finding, there was no evidence sustaining it. Defendants are mistaken. The evidence shows that June 7, 1937, plaintiff bought from the driver of defendants' truck seven tubs of butter at \$136.64, giving in payment therefor his check for \$112 and the balance in cash. This balance of \$24.64 was therefore a mere matter of computation.

There is no reversible error in the record and the judgment is affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

in the first place, because the fact that the defendant was not at the time of the commission of the crime is not a defense. The only authority, here the fact of his agency was established. The record question is the extent of the authority of the agent. The record shows he was authorized to sell, collect, receive and deliver and to accept checks in the order of defendant. Defendants were bound not only by his actual but apparent authority. Under the evidence the issue presented was of fact on which the finding of the jury was for plaintiff. This finding in fact alone is sufficient to the same weight as the verdict of a jury. Moreover, the proceeds and the findings here also defendant received plaintiff's money and refused either to deliver the goods or return it. Defendants cannot be heard to deny authority of their agent while they retain the money which the agent received for them in transactions with the plaintiff. Defendants say that as to an item of \$24.64 cash, included in the count finding, there was no evidence sustaining it. Defendants re-allege. The evidence shows that June 7, 1934, plaintiff bought from the driver of defendant's truck seven tape of butter at \$36.64, giving in payment therefor his check for \$12 and the balance in cash. This balance of \$24.64 was therefore a mere matter of computation.

There is no reversible error in the record and the judgment is affirmed.

ATTORNEYS

McCarthy, F. L., and O'Connor, J., counsel.

JOHN F. GRAUENWEGEN,

Appellee,

vs.

CHRISTINE H. RONER, 3000 E. 10TH ST.,
et al.

Appellants.

APPEAL FROM

CIRCUIT COURT

SOUTH DAKOTA.

299 1.A. 311

MR. JUSTICE MARCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal from a deficiency decree for the sum of \$1,824.92 entered on April 13, 1938, in favor of Gruenewegen and against the Roners, pursuant to a decree of foreclosure entered March 4, 1938, in an action began December 10, 1937, wherein Gruenewegen was plaintiff and the Roners and others defendants.

It is contended first that the allegations of the complaint do not justify the decree; that it does not set forth the terms of the trust deed and notes on which the suit was based; that the complaint does not show any right to foreclose in that the trust deed conveyed to a trustee and not the plaintiff, and that the right of foreclosure was for ought alleged in the complaint vested exclusively in the trustee.

The complaint alleges the execution by the Roners, husband and wife, on July 9, 1928, of their note for \$1600, an amount for which they were indebted; the execution of the trust deed to the Chicago Title and Trust Company "to secure the said note"; that the note matured July 9, 1931, when it was extended until July 9, 1934; "that the plaintiff is the owner of the said note and said trust deed"; that default has been made in the terms of the trust deed and note in that the Roners have failed to pay the amount due as principal and interest; that plaintiff has been compelled to employ an attorney in and about the filing of the

complaint and is obligated to pay attorney's fees "herein", which is an additional indebtedness under the said trust deed; that plaintiff will be obligated to incur other costs "which are additional liens under said trust deed".

The complaint prays for foreclosure of the trust deed, for judgment for deficiency for any balance that may be due after sale of the premises and for general relief.

Defendants were served but did not appear or answer. The cause was referred to a master. It is apparent defendants (Hobers) were informed as to the proceeding for they filed objections to the report of the master, which were overruled. They did not in their objections make the specific points on which they now insist. A copy of the trust deed and unpaid notes are attached to the complaint. Defendants say that there are no facts pleaded on which allowances for attorneys' fees, stenographer's charges, title charges or interest could be based. The trust deed provided for the payment of all these. It is urged that the complaint does not aver by whom the extension agreement was made. While these might well have been set up, the allegations which appear in the absence of any objection by defendants was, we hold, sufficient under the Civil Practice Act, which was applicable. Section 42 of that act (subsections (2) and (3)) provides:

"No pleading shall be deemed bad in substance which shall contain such information as shall reasonably inform the opposite party of the nature of the claim or defense which he is called upon to meet.

"All defects in pleadings, either in form or substance, not objected to in the trial court, shall be deemed to be waived."

It is true the complaint did not (as under the former practice act was usual) specifically make the copy of the trust deed attached thereto a part of the bill, but this is, we hold, unnecessary under Section 36 of the Practice Act which provides:

"Whenever an action, defense or counterclaim is founded upon a written instrument, a copy thereof,

conclusion and is subject to the same treatment as the other cases. It is an obvious fact that the law is not a science, but an art. It is not a science because it is not a body of knowledge which can be taught. It is an art because it is a body of knowledge which can be learned by practice.

The conclusion is that the law is not a science, but an art. It is not a science because it is not a body of knowledge which can be taught. It is an art because it is a body of knowledge which can be learned by practice.

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or of so much of the same as is relevant, must be attached to the pleading as an exhibit or recited therein, unless the pleader shall attach to his pleading an affidavit stating facts showing that such instrument is not accessible to him. In pleading any written instrument a copy thereof may be attached to the pleading as an exhibit. In either case the exhibit shall constitute a part of the pleading for all purposes. No proffer shall be necessary."

The former practice is compared with the present under this section in Illinois Civil Practice Act Annotated, McCaskill, pp. 77-78, and in the 1936 edition, pp. 82-84.

The defendants also complain (quoting the exact language of their brief under Point IV) "The record shows the complete failure of plaintiffs to produce in evidence the trust deed or notes upon which his claim for a deficiency judgment depends. The plaintiff was shown a typewritten copy of a trust deed with typewritten names and he swore that these typewritten names were the true and genuine signatures of Christine M. Rorer and Arne T. Rorer (Abst. 7, 8). The same kind of testimony was given in the attempt to prove the principal note (Abst. 8); the extension agreement (Abst. 9); and the extension interest coupons (Abst. 9). Obviously this conscientious method of proving a case is conducive to fraud and injustice. No testimony was offered to show an excuse for the non-production of the originals." This statement is wholly unjustified. The record shows that the original documents were shown to the witness, who testified they bore the genuine signatures of the makers, and later the solicitor for plaintiff asked and obtained leave of the master to withdraw the original exhibits and substitute copies therefor, which are in the record. The plaintiff upon the ground that the sole purpose of the appeal was for delay and vexation moved the court to assess 10% of the amount of the deficiency decree for damages as provided by the statute (see Ill. State Bar. Stats., 1937, chap. 33, sec. 23, par. 23). We hold with some hesitation the motion ought not to be allowed. The decree will be affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

of the same kind as the one which is described in the preceding paragraph. It is a small, round, black, and very hard, and is found in the same places as the other two. It is also very hard, and is found in the same places as the other two. It is also very hard, and is found in the same places as the other two.

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PEOPLE OF THE STATE OF ILLINOIS,
 ex rel EARLE E. SALAND,

Appellant,

vs.

JOHN J. HALLIHAN, Director of the
 Department of Registration and
 Education of the State of Illinois,

Appellee.

APPEAL FROM

CRIMINAL COURT

COOK COUNTY.

299 I.A. 611

4

MR. JUSTICE RATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff from an order which sustained certain pleas to his petition for a mandamus and dismissed the action with costs.

On February 25, 1938, Saland filed his petition in the name of the People against Hallihan, Director of the Department of Registration and Education, averring that at an examination conducted by the Department on January 10, 11 and 12, 1932, he took the examination for a license to practice the treatment of human ailments as "other practitioner" and passed it; that in February, 1922, he received information from the Department that he had passed and that his license would be issued to him upon receipt of \$5.00; that accordingly he forwarded to the Director of the Department on March 6, 1922, a cashier's check for that amount, which the Director received and cashed and avails of which are held among the funds of the Department. His petition further averred that he was graduated from the National School of Chiropractic, which was and is duly recognized by the Department of Registration and Education and the graduates of which are permitted to participate in examinations conducted by the Department; that the curriculum of petitioner in the college consisted of anatomy, laboratory, histology, diagnosis, physiology, chemistry, spinal analysis, pathology, practice, chiropractic technique, physiotherapy,



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clinical diagnosis, clinic and dissection. The studies are contained in the curriculum and are required and demanded by the Department as a condition precedent of eligibility for the examination which he took.

The petition further avers that the Department failed to issue the license; that on various occasions he consulted with the officials relative thereto and demanded of them that the license issue; he was informed that the license would eventually be issued; that in the meantime he was at liberty to carry on the practice of his profession, namely, "the treatment of human ailments without the use of drugs and without operative surgery as 'ether practitioner' to the same effect and purpose as if he, your petitioner, had received said license". The petition further avers that on April 16, 1937, the Department and defendant Mallihan, Director thereof, admitting the facts in the premises, refused to issue the license; that during February, 1938, a license was erroneously mailed; that the Department and its Director have no record of the petitioner having taken the examination; that the Department has record of other sums paid by petitioner for the privilege of taking the examination and of the sums received from him for the issuance of his license as "ether practitioner"; that by means of the foregoing he is prevented from carrying on his practice according to law which he is justly and lawfully entitled to do. The prayer of the petition is that a writ of mandamus issue directed to Mallihan as Director, etc., to forthwith issue and deliver the license and such further orders as justice may require. The petition is verified.

The defendant filed its answer admitting an examination was conducted as averred on January 10, 11 and 12, 1937; that Maland took the examination but denying that he passed it, on the contrary stating that he failed to make the general average as required by the Department and the rules and regulations thereof. The answer

also denied the Department had at any time notified plaintiff that he successfully passed the examination or that his license would be issued to him upon payment of \$5.00; that on the contrary subsequent to the examination a fee of \$5.00 was received in the Springfield office of the Department but was not accepted because the petitioner had failed in the examination and that thereafter, on December 11, 1924, this fee was returned to petitioner. The answer further asserts that in January, 1922, when petitioner was admitted to the examination, the Department was operating under the Medical Practice Act of 1899; that under the provisions of that Act, applicants for such licenses were not required to furnish proof of graduation from an accredited professional school; that as a matter of fact, no drugless schools, such as the school from which plaintiff was graduated (National School of Chiropractic) were accredited by the Department; that the requirement for registration at the time and place of examination was that the applicant pass a successful examination in certain subjects prescribed, but as to this requirement plaintiff failed to meet the same in that he failed to pass the examination on these subjects. The answer says Defendant did not issue the license to plaintiff in 1922 and did not inform plaintiff his license would eventually be issued or that in the meantime he was at liberty to practice his profession. On the contrary, plaintiff failed to pass the examination prescribed and is, therefore, not entitled to receive the license.

As a further defense the answer states that on April 22, 1937, plaintiff filed a mandamus proceeding in the Circuit Court of Sangamon County against defendant, involving the same subject matter and raising identical issues as here. A copy of the petition filed in that case is attached to the answer and incorporated in it as Exhibit "A". The answer avers that thereafter defendant on April 30, 1937, in the Sangamon County Circuit Court filed a motion to strike

and dismiss this petition for mandamus, a copy of said motion being attached and made a part of the answer; that the court, after full hearing, struck the petition from the files and entered a final order dismissing the suit and assessing costs against plaintiff. A copy of this order is likewise attached and incorporated in the answer as Exhibit "C". The answer says that on May 21, 1937, plaintiff served on the Attorney General and upon defendant an appeal notice whereby he appealed to the Appellate Court of the State of Illinois from the final order and judgment entered by the Circuit Court of Sangamon County on May 5, 1937, a copy of which notice of appeal is also attached and made a part of the answer as Exhibit "D". The answer further avers the appeal was never perfected to the Appellate Court of Illinois but was abandoned, and avers that this was a final adjudication of the issues which are the subject matter of this suit and that defendant pleads res adjudicata to the matters and things set forth in the cause, and avers plaintiff is estopped to raise these issues in this proceeding by reason of the final judgment entered by the Circuit Court of Sangamon County, Illinois, May 5, 1937. By further answer the defendant sets up the 6 year Statute of Limitations of the State of Illinois; says that on its face the petition shows plaintiff is guilty of laches and for that reason is not entitled to a mandamus. The answer also denies that plaintiff is entitled to relief of any kind.

The cause came on for hearing upon the plea of laches and also the plea of res adjudicata, and upon the hearing thereof the petition was dismissed at plaintiff's cost and there was judgment that the plaintiff take nothing and defendant recover costs. From that judgment plaintiff prosecutes this appeal.

The plaintiff contends (citing cases such as Van Dorn v. Andersen, 219 Ill. 32, and People v. Dunn, 256 Ill. 441) that a writ of mandamus will issue to command the performance of an official act which is merely ministerial and not judicial, and cites State v.

Alcock, 206 Mo. 550, 105 S.W. 270, to the proposition that Boards of Health are not judicial bodies in that their duties are administrative not ministerial, and that for their refusal to perform a given duty mandamus will lie. All this is elementary. Plaintiff also contends that the duty here set forth was a continuing one against which the bar of the Statute of Limitations or laches cannot avail to defeat plaintiff's action. All this for purposes of this decision may also be conceded without in any way determining the merits of this appeal, although on its face the petition shows laches which would bar recovery. Carroll v. Kauston, 341 Ill. 231; Hopkins v. Ames, 344 Ill. 527. The answer of the defendant set up new matter which, if true, was determinative of the appeal upon the merits and to this new matter plaintiff failed to reply either admitting or denying it. Under Section 4 of the Mandamus Act, (Ill. State Bar Stats. 1937, chap. 87) petitioner had the right to reply as in other civil cases. He did not avail himself of this privilege, and this new matter (namely, that the issue here had been adjudicated in the Circuit Court of Sangamon County) stands admitted on the record. The writ of mandamus is not a writ of right. One praying for such a writ must show a clear right thereto. Evans v. Harper, 294 Ill. App. 164. Plaintiff has no right to the writ because he is barred by laches, ~~XXXXXXXXXXXXXXXXXXXXX~~ and because the matter has been adjudicated between these parties by the Circuit Court of Sangamon County. For these reasons the judgment will be affirmed.

AFFIRMED.

McGuire, F. J., and O'Connor, J., concur.

[illegible]

THE UNIVERSITY OF CHICAGO LIBRARY

40365

JOSEPH GLASS,

Appellee,

vs.

STANLEY MARESH,

Appellant.

MUNICIPAL COURT

OF CHICAGO.

299 I.A. 612¹

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Cohen, the owner of premises known as 3059 South Kedzie Avenue in Chicago, on January 31, 1927, leased the same to Lohucik. Stanley Maresk, the defendant, purchased from Lohucik the business conducted by him and went into possession of the premises in October, 1927. He continued to occupy the same until June 14, 1934, when he was dispossessed by a judgment in forcible entry and detainer in favor of Glass, who in the meantime by deed had taken title to the premises.

This suit in the trial court was by Glass against Maresk for rent due and unpaid under the terms of the lease during the time he occupied the premises. The amount claimed was \$2,344.30. The cause was tried by the court. There was a finding for plaintiff in the sum of \$1,195, with judgment thereon and defendant appeals.

The defendant argues in the first place that the statement of claim does not set forth a cause of action in that plaintiff claimed as assignee under the lease while the statement did not aver that he was the bona fide owner and set forth how and when he acquired title as required by Section 22 of the Civil Practice Act, (Ill. State Bar Stats. 1937, chap 110, p. 2386.) The contention cannot prevail for several reasons. In the first place

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defendant in the trial court made no objection to the statement of claim. The issue as to the assignment was in fact tried out. Evidence thereon was introduced by the parties. The court made a finding. Under such circumstances we will not reverse the judgment in order that a better pleading may be supplied. (Lyons v. Easter, 285 Ill. 336.) Section 42 of the Civil Practice Act, (Ill. State Bar Stats., 1937, Sec. 42 (2), (3)) provides:

"(2) No pleading shall be deemed bad in substance which shall contain such information as shall reasonably inform the opposite party of the nature of the claim or defense which he is called upon to meet.

"(3) All defects in pleadings, either in form or substance, not objected to in the trial court, shall be deemed to be waived."

In the second place plaintiff took title to the premises by deed. He had the right to sue on the lease irrespective of Section 22 of the Civil Practice Act by virtue of Section 14 of the Landlord and Tenant Act (Ill. State Bar Stats., 1937, chap. 80, p. 1937; Schreger v. Electric Apparatus Co. 270 Ill. App. 339.)

Again the defendant contends that the judgment should be reversed because there was a variance between the pleadings and the proofs in that while the statement of claim alleged a cause of action based on an assignment of the written lease, defendant on the trial was allowed to show what amounted to an oral leasing of the premises for a period of years, which brought the lease within the provisions of the Statute of Frauds. Plaintiff claimed only for the time defendant was actually in possession of the premises and his possession is admitted. The defense of the Statute of Frauds could not have been successfully interposed under such circumstances. Moreover, the Statute was not pleaded as a defense. Further no claim of variance was made in the trial court as was necessary to preserve the question in a court of review. (Ill. Terminal v. Thompson, 210 Ill. 226; Pickett v. Ruchan, 323 Ill. 138.)

It is next contended the court erred in admitting in evidence over defendant's objections plaintiff's exhibit No. 5, which was a ledger sheet which Cohen testified was in the handwriting of Snider and Miss Tesoy, his employees. He also testified that the record was kept under his supervision and control and that it showed correctly the defendant's account. Snider also testified that the paper was an original memorandum of defendant's account. The abstract shows that this ledger sheet was admitted in evidence over a general objection, and that defendant made a motion to strike it which was denied. We think the evidence was admissible.

(Chisholm v. Reaman Machine Co., 160 Ill. 131.) The trial was by the court. There was other evidence sufficient to sustain the findings; therefore, the admission of this evidence, though erroneous, would not be reversible.

Lastly, the defendant contends that the finding of the court was contrary to the evidence. The claim of the plaintiff, verified, was for \$2,844.50. Defendant admits he owed \$180. The plaintiff argues plausibly that the judgment was for an amount less than was actually due. The uncontradicted evidence showed defendant was in possession of the premises for about six years; that he rarely paid his rent in full for any month; that he remained in possession of the premises until he was put out under a judgment in forcible detainer; that the 5-day notice on which the forcible entry and detainer suit was based and which was served on him stated that the sum of \$1,497 was due and in arrears for rent and demanded payment thereof. The lease, as well as the 5-day notice, were produced by defendant who was called as a witness under Section 53 of the Municipal Court Act and who also testified in his own behalf. He related his occupation of the premises as above described and stated that receipts were given to him when he paid rent. These receipts, he said, had been lost. For a time he paid \$100 per month.

The depression came, then he paid 175 per month; later \$50 per month and afterwards \$40. He says he told Cohen, with whom he talked, that he could not pay any more. He moved from the premises June 14, 1933. The lease and deed in evidence with testimony by the plaintiff to the effect that the rent was not paid cast upon defendant the burden of showing payment.

Upon review the finding of the trial court is entitled to the same weight as a verdict of a jury. The court heard all the evidence which was somewhat conflicting and very much confused. Two courts have now held rent to be due. (Schwarz v. Cooke, 207 Ill. App. 310.) We cannot say the judgment is clearly and manifestly against the weight of the evidence. It will be affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

RICHARD C. MAZER, Individually and as
 Executor of Estate of Kathie Mazer,
 also known as Katherine Mazer,
 Appellee,

vs.

CHARLES J. SCHAEFER and WILLIAM
 A. SCHAEFER,
 Appellants.

APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

299 I.A. 612²

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff sued to recover compensation for occupation and use of certain premises, also demanding interest from the date on which the amount claimed was due. Defendants filed an answer denying liability. They also demanded trial by jury. January 26, 1938, this suit was dismissed for want of prosecution; May 24, 1938, plaintiff filed a petition under section 21 of the Municipal Court act praying the order of January 26 might be set aside and the cause stand for trial; defendants answered; the court set aside the order of dismissal and reinstated the case; May 26 defendants moved to vacate this order of May 24, which was denied; defendants appeal from the order of May 24, 1938, and the order of May 26.

Defendants say the court had inherent power to dismiss the cause for want of prosecution, that the order of dismissal was a final order, and that upon expiration of 30 days thereafter the court was without jurisdiction to set the order aside. Such is the general rule, to which there are exceptions. Section 21 of the Municipal Court act (Ill. State Bar Stats., 1937, par. 376) provides in substance that every judgment order or decree of the court, final in its nature, shall be subject to be vacated, set aside or modified in the same manner and to the same extent as judgments of the Circuit court might be during the term at which the same were entered; that after that time judgments shall not be vacated, set aside or

RICHARD C. MAZUR, Individually and as
 Executor of Estate of Josephine
 also known as Katherine Maizer,
 Appellee.

AND OF THE MUNICIPAL

vs.

CHARLES J. SCHAEFER and WILLIAM

Appellants.

MR. JUSTICE MARCHET DELIVERED THE OPINION OF THE COURT.

Plaintiff sued to recover compensation for occupation and use of certain premises, also demanding interest from the date on which the amount claimed was due. Defendants filed an answer denying liability. They also claimed that the court was not a court of law.

1933, this suit was dismissed for want of prosecution; May 24, 1933, plaintiff filed a petition under section 21 of the Municipal Court act seeking the order of January 23 might be set aside and the cause stand for trial; defendants answered; the court set aside the order of dismissal and reinstated the case; May 23 defendants moved to vacate this order of May 24, which was denied; defendants appeal from the order of May 24, 1933, and the order of May 23.

Defendants say the court had inherent power to dismiss the cause for want of prosecution, that the order of dismissal was a final order, and that upon expiration of 30 days thereafter the court was without jurisdiction to set the order aside. Such is the general rule, to which there are exceptions. Section 21 of the

Municipal Court act (Ill. State Bar Stat., 1937, par. 270) provides in substance that every judgment order or decree of the court, final in its nature, shall be subject to be vacated, set aside or modified in the same manner and to the same extent as judgments of the Circuit court might be during the term at which the case was entered; that after that time judgments shall not be vacated, set aside or

modified except by appeal or suit in equity or by a petition setting up grounds for vacating which would be sufficient in equity "provided" all errors of fact which by common law could have been corrected by the writ of error coram nobis, may be corrected after the expiration of 30 days by a motion in the nature of that writ. It appears from this statute that a final judgment of the Municipal court may be modified or set aside after 30 days in four ways: First, by appeal; second, by bill in equity; third, by petition; fourth, by motion. The controlling question here then is whether sufficient facts were disclosed to the court to justify the entry of the order of reinstatement after the expiration of 30 days.

The uncontradicted facts, as we gather from the petition, the answer and other pleadings, are: This suit was filed October 23, 1935; prior to November 30, 1937, it was on the past trial calendar and on that date an order was entered putting it on the regular calendar; the trial Judge advised the attorneys to see the Assistant Chief Justice to the end that the case might be placed on the proper calendar. By rules of the Municipal court the judges established jury calendars for the convenience of the judges and litigants. This cause was place on the Trial Calendar 1, List Number 816. December 1, 1937, the attorneys for the parties appeared before the assistant to the Judge as suggested by the Chief Justice and were advised by him that, as requested, the case would be placed on Calendar No. 1 and set for trial in Room 1112 after the first of the year.

January 5, 1938, plaintiff's attorney again consulted the assistant to the Chief Justice, who advised him to watch the call of the calendar of Judge Schiller in room 1112, and expressed the opinion that the case would not be called for trial before February. The cause appeared on the calendar of Judge Schiller in room 1112 on February 11, and at that time attorneys for the parties

modified except by appeal or writ in equity or by a petition setting up grounds for a writ which would be sufficient in equity "provided" all errors of fact which by common law could have been corrected by the writ of error coram nobis, may be corrected after the expiration of 30 days by a motion in the nature of a writ. It appears from this statute that a final judgment of the municipal court may be modified or set aside after 30 days in four ways: first, by appeal; second, by writ in equity; third, by petition; fourth, by motion. The controlling question here then is whether sufficient facts were disclosed to the court to justify the entry of the order of reinstatement after the expiration of 30 days. The uncontroverted facts, as we gather from the petition, the answer and other pleadings, are: This writ was filed October 23, 1935; prior to November 30, 1937, it was on the past trial calendar and on that date an order was entered putting it on the regular calendar; the trial judge advised the attorneys to see the Assistant Chief Justice to the end that the case might be placed on the proper calendar. By rules of the Municipal Court the judges established jury calendars for the convenience of the judges and litigants. This case was placed on the trial calendar 1, first under 510. December 1, 1937, the attorneys for the parties appeared before the Assistant to the Judge as suggested by the Chief Justice and were advised by him that, as requested, the case would be placed on Calendar No. 1 and set for trial in Room 112 after the first of the year. January 5, 1938, Plaintiff's attorney again consulted the Assistant to the Chief Justice, who advised him to watch the call of the calendar of Judge Schiller in room 112, and expressed the opinion that the case would not be called for trial before February. The cause appeared on the calendar of Judge Schiller in room 112 on February 11, and at that time attorneys for the parties

agreed that it be continued until April 12, 1938. Plaintiff's attorney on April 12 appeared in the room named, at which time he was informed the cause could not be tried because it had been dismissed by a prior order. Without the knowledge of either plaintiff or defendants or their attorneys the case had been called in room 1114 January 26 before Judge Hartigan and dismissed also without their knowledge. On April 12, 1938, and at all times, plaintiff was ready, willing and able to prosecute his suit.

It is a rule of practice in the Municipal court that when a case is dismissed for want of prosecution notice shall be sent to the attorneys of record. The appearance of plaintiff's attorney was on file in the court at all times but no such notice was sent to or received by him. Because of this prior order of Judge Hartigan no order was entered on April 12 by Judge Schiller. Attorney for plaintiff first obtained knowledge of the order of dismissal on April 12, 1938. The petition of plaintiff avers that by mistake of the clerk of the Municipal court the cause was inadvertently placed on Judge Hartigan's calendar in room 1114, and thereby plaintiff was prevented from presenting his motion to reinstate within the 30 day period. The petition also averred that if the court had known of this mistake the order of dismissal would not have been entered. The petition says the case of Mazer v. Schaefer did not appear on the Municipal court record as assigned to room 1114 for hearing. However, search has now disclosed that a case entitled Mayer v. Schaeffer appeared there. The petition is verified by plaintiff, and in support of the motion an affidavit of the attorney of record for plaintiff corroborating the statements above set forth was submitted.

Defendants answered. The answer does not deny the facts stated in the petition but says that it appears from the records of the Municipal court in the cause that it was duly assigned to room

agreed that it be continued until April 12, 1938. Plaintiff's attorney on April 12 appeared in the room named, at which time he was informed the case could not be tried because it had been dismissed by a prior order. Without the knowledge of either plaintiff or defendants or their attorneys the case had been called in room 1114 January 28 before Judge Hartigan and dismissed also without their knowledge. On April 12, 1938, and at all times, plaintiff was ready, willing and able to prosecute his suit. It is a rule of practice in the Municipal Court that when a case is dismissed for want of prosecution notice shall be sent to the attorneys of record. The appearance of plaintiff's attorney was on file in the court at all times but no such notice was sent to or received by him. Because of this prior order of Judge Hartigan no order was entered on April 12 by Judge Connelley. Plaintiff first obtained knowledge of the order of dismissal on April 12, 1938. The petition of plaintiff avers that by mistake of the clerk of the Municipal Court the case was inadvertently placed on Judge Hartigan's calendar in room 1114, and thereby plaintiff was prevented from presenting his action as reheard within the 30 day period. The petition also avers that if the court had known of this mistake the order of its issue would not have been entered. The petition says the case of Barker v. Donaher did not appear on the Municipal Court record as assigned to room 1114 for hearing. However, search has now disclosed that a case entitled Mayer v. Donaher appeared there. The petition is verified by plaintiff, and in support of the motion an affidavit of the attorney of record for plaintiff corroborating the statements above set forth was submitted.

Defendants answered. The answer does not deny the facts stated in the petition but says that it appears from the records of the Municipal Court in the case that it was duly assigned to room

1114 for trial; that it appeared for the first time on the published calendar as pending in room 1114 on January 17, 1938, and was continued from day to day until January 26, 1938, when the order of dismissal was entered. The answer also sets up that on April 13, 1938, the attorney for plaintiff appeared before Judge Hartigan and presented an oral motion to vacate the dismissal, which the court denied, whereupon the motion was withdrawn and no formal order entered. The answer also avers that after January 26 the cause appeared on the call of cases assigned to room 1112 for February 1, and from time to time until February 11, when it was continued to April 12, 1938. The answer avers by way of conclusion that all orders subsequent to that of dismissal were void.

In so far as the merits of the appeal are concerned, it might be disposed of speedily in favor of plaintiff on the ground that defendants, by appearing in the court after the order of dismissal was entered and by agreeing to an order continuing the cause and setting it for trial on April 12, waived the prior order of dismissal and are now estopped. Freise v. Mid-City Trust & Savings Bank, 298 Ill. App. 17.

However, on the uncontradicted facts as they appear from the pleadings, the court had jurisdiction under section 21 of the Municipal Court act to set aside the order of dismissal. Whether the petition of plaintiff is regarded as a complaint in equity to set aside a judgment entered as a result of mutual mistake and grant a new trial or motion in the nature of a writ of error coram nobis as provided for in section 21 of the Municipal Court act and section 7 of the Civil Practice act, the order of reinstatement was justified. The errors which may be corrected by the motion are "errors of fact" which, if known to the court, would have prevented the entry of the judgment, which are not the result of negligence and which do not contradict the records of the court. We cannot suppose that if the

the trial; that it appeared for the first time on the published calendar as coming in from the trial on January 17, 1933, and was continued from day to day until January 26, 1933, when the order of dismissal was entered. The answer also came in from the trial on January 17, 1933, the attorney for plaintiff appeared before Judge Davidson and presented an oral motion to vacate the judgment, which the court denied, whereupon the motion was withdrawn and no further order entered. The answer also came in from the trial on January 26, 1933, and from time to time until February 11, when it was returned to the court. The answer came in by way of conclusion and all orders subsequent to that of dismissal were void. In so far as the merits of the appeal are concerned, it might be discussed at length in favor of plaintiff on the ground that defendant, by appearing in the court after the order of dismissal was entered and by appearing to an order continuing the trial and setting it for trial on April 12, waived the order of dismissal and the case was now reopened. Travis v. Mid-City Bldg. & Loan Assn., 203 Ill. App. 17. However, on the undisputed facts as they appear from the pleadings, the court had jurisdiction under section 21 of the Municipal Code not to set aside the order of dismissal. Whether the petition of plaintiff is regarded as a complaint in equity or as a judgment entered as a result of mutual mistake and fraud is a new trial or motion in the nature of a writ of error coram nobis as provided for in section 21 of the Municipal Code set and section 72 of the Civil Practice Act, the order of rehearing seems well justified. The errors which may be corrected by the motion are errors of fact which, it known to the court, would have prevented the entry of the judgment, which are not the result of negligence and which do not contradict the records of the court. We cannot suppose that it is

facts as set forth in the petition had been called to the attention of the court, or if the court had knowledge thereof, the order of dismissal would have been entered. The errors of fact alleged do not contradict the record. It appears neither plaintiff nor his attorney was negligent. In any view of the case the order entered by the trial court reinstating the cause and setting it for trial was proper.

The orders are affirmed.

ORDERS AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

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PEOPLE OF THE STATE OF ILLINOIS,

Defendant in Error,

vs

FRANK C. PADEREWSKI,

Plaintiff in Error.

ERROR TO

COUNTY COURT

COOK COUNTY.

299 I.A. 612¹

MR. JUSTICE LATCHETT DELIVERED THE OPINION OF THE COURT.

Paderewski, on a plea of not guilty, was tried on an information of five counts, filed by Charlotte Hermes, each of which charged him with the violation on April 1, 1937, of Section 34 of the Medical Practice Act (Ill. State Bar Stats., 1937, chap. 91, p. 2002). There was a trial by jury with verdict of guilty. Motions for a new trial and in arrest were overruled and judgment on the verdict was entered with sentence that defendant should pay a fine of \$100 and costs and be committed to the County Jail for 30 days. By this writ of error defendant seeks to reverse the judgment.

Prior to his plea defendant made a motion to quash the information and each count of it. The motion was denied. This is the first of the alleged errors argued. The information in the several counts in substance charges that defendant, without a license, unlawfully attached the titles Doctor, Physician, Surgeon, M. D. or similar words or abbreviations to his name, indicating that he was engaged in the treatment of human ailments as a business; had his name printed in the directory of the building at 302 South State Street as "Paderewski and Paderewski, Chiropractors"; caused his name to be printed on a professional business card as "Frank C. Paderewski, D.C. -- Chiropractor"; had his name listed in the Chicago Classified Telephone Directory as a chiropractor, and caused letterheads bearing similar words to be printed; that he maintained an office for examination and treatment of persons

EXHIBIT ON THE PART OF THE DEFENDANT

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afflicted or supposed to be afflicted at Rooms 1103-02, No. 302 South State Street, equipped with a chiropractic table, etc., for treatment of afflicted persons; that defendant diagnosed or attempted to diagnose the supposed ailment of Charlotte Hermes (also known as Mrs. E. Schultz) as a rotated cervical bone at the top of the spinal column, and did unlawfully operate upon, profess to heal, prescribe for and otherwise treat an ailment or supposed ailment of another, namely, Charlotte Hermes; that defendant recommended or prescribed a form of treatment for the medication, relief or cure of a physical or mental ailment with the intention of receiving a fee, gift or compensation, etc., contrary to Section 24 of the statute, etc. The information is practically in the language of the statute and does not negative the exceptional cases to which this section of the statute (by other sections) is declared to be not applicable.

The objections to this information are similar to those urged on behalf of the defendant in People v. Shaver, 239 Ill. App. 612 (affirmed by the Supreme Court in 367 Ill. 339), and in People v. Spencer, 16 N.E. (2d) 925. There, as here, the defendant relied on People v. Brown, 336 Ill. 257; People v. Barnes, 314 Ill. 140; People v. Berman, 316 Ill. 547, and People v. Ellis, 316 Ill. 376. We held in those cases that the objections to the information were not well taken and the Supreme Court approved the judgment of this court. It would serve no useful purpose to further discuss these objections.

The evidence offered was given by Charlotte Hermes, who is an investigator for the State Department of Registration and Education. She was the complaining witness in People v. Spencer. Her testimony here is to the effect that she went to defendant's office at 302 South State Street about March 29, 1937, met the defendant there, and that he asked her to return at 3 o'clock,

which she did. She described the sign on the directory of the building, which was "Paderewski & Paderewski, Chiropractors". She told defendant she had been suffering with headaches, heard about chiropractic treatments and wondered if these would help. Defendant told her to come into the inner office. She did so. She told him her name was Mrs. Schultz and that she lived in Cicero. He asked her what illnesses she had had as a child, her name and address, then said that chiropractic treatments were especially good for the headache of which she complained and pains which she told him she had in her shoulder and arm. He had a number of charts on the wall and used these in making explanations. Defendant asked her if she was interested in having an examination. She said she was. He gave her a white gown and told her to go into the dressing room and put the gown on and that he would examine her back, which he did. She came out of the office and sat on a small stool with her back to him. He used a neurochrometer, an instrument which (as he explained to her) showed the temperature of any nerve that was pinched. He applied this instrument with pressure to her back and said if there was any pinched nerve or any congestion that it would cause a temperature which would show, and in that way he could tell whether she had trouble in the upper part of her neck. He said he would not give a treatment until X-rays had been taken. He told her to go to an X-ray laboratory and have taken an X-ray of the upper part of her neck. He said that her trouble was in the upper part of her neck -- the cervical. She obtained the X-ray, went back to defendant's office about April 1, about 10:30 in the morning and saw defendant who told her he had received the X-ray. He told her that the upper part of the neck was rotated to the right and this caused all her headaches and the pains in her shoulders. She again put on the white gown and he examined her back, pressed on the vertebrae with his hands, applied pressure to the bones in the region of the shoulder blades. She could hear the bones snap. He

told her to lie on her back, held her hand with his hands and turned it sideways with rather quick movements. He applied the neurochrometer, with its two prongs fitting into the spinal column. The examination lasted about an hour. Defendant told her that in three months he could have her feeling all right; that if it took longer than three months he would not charge anything extra. The charge was \$50 for three months. He said that the bone was being rotated in the neck, and this was causing headaches. She told him she could not afford to pay \$50. She paid him \$5 and he gave her a receipt, a card and a little booklet. These were offered in evidence but are not abstracted and cannot be found in the record.

The witness testified that defendant's office consisted of a reception room and an inner office, which were nicely furnished; that the inner office had a desk and chiropractic table which was upholstered and extended in the air and would lower with the weight of the patient on it. There was a dressing table and a mirror and day bed. She gave him the name of Mrs. E. Schultz and her address as 1835 South 58th Court, Cicero, Illinois. Neither name nor address was correct. She had made arrangements to have ^{any} letter from him received at that number and such letter was received. The letter and envelope in which it was contained were offered in evidence but are not indexed in the abstract, and an examination of the record discloses the same are not in it.

The complaining witness was sent to defendant's office by her superiors. Defendant did not testify. No evidence in his behalf was submitted. As already stated, important exhibits are not found in the record. Charlotte Hermes testified that she was not ill when she visited the office of defendant and that she went there to gather evidence of the unlawful practice in which it was believed defendant was engaged. For the same reason she gave him a fictitious name and address. Defendant claims on the authority of People v. Beach, 286 Ill. App. 272, and People v. Casagliata,

362 Ill. 427, 200 N. E. 169, that this amounted to entrapment and that a request for an instruction in defendant's favor should have been given for this reason. Further, that there was error in refusing to give the jury an instruction^{requested} to the effect that "If the officers of the law inspire, incite or otherwise persuade or lure a defendant to commit a crime which he had no intention of committing, and would not have otherwise committed, then, under the law, in the absence of other incriminating evidence, the defendant should be acquitted." There was no error in this respect. In People v. Spencer, 16 R.S. (2nd) 935, we held in a case where there was a similar conviction on the testimony of Charlotte Hermes under similar circumstances that the judgment was not reversible for that reason. This is not a case where an officer of the law inspired, incited or lured the defendant to commit a crime which he otherwise had no intention to commit. There is no evidence tending to so show. The officer merely afforded the defendant an opportunity to commit one of a series of crimes which he had already planned. The distinction is vital. People v. Quagliata, 362 Ill. 427; In re Horwitz, 360 Ill. 313; Correia v. United States, 287 U.S. 435, 77 L. Ed. 413.

The defendant finally contends that error was committed upon the trial of the cause in that the State's Attorney was permitted to comment on defendant's failure to testify in his own behalf. In support of this contention he cites such cases as Austin v. People, 109 Ill. 261; Quinn v. People, 123 Ill. 393; and People v. Donaldson, 255 Ill. 31, with many others. The rule is, of course, well known and should be vigilantly enforced. The remark of the State's Attorney to which defendant objects was "If the defendant here, Mr. Paderewski, had a license of any kind, to practice medicine in any form, shape or manner in the State of Illinois, it was his duty to produce it." While the remark of the State's Attorney might have been more happily phrased, we do not

think he transgressed the rule. The State always has the right to discuss the evidence as it actually is. We think this statement, while close to the line, amounted to no more. People v. Paisley, 299 Ill. 576. We find no reversible error in the record. The guilt of the defendant is established without any doubt whatsoever, and the judgment will be affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

which he presented the fact that the same thing had happened
elsewhere in the world, and that it was not a new thing,
while also to the fact, mentioned in the same document, that
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40398

JENNIE REID,
Appellant,

vs.

JOHN F. DOLAN and ALICE E. DOLAN,
Appellees.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

29971-8124

MR. JUSTICE HATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff from an order entered May 19, 1938, vacating a judgment entered upon the verdict of a jury upon an ex parte trial on March 16 of the same year. The proceeding was by motion supported by a petition pursuant to section 72 of the Civil Practice act. Defendants' petition was filed April 26, 1938, and was amended after filing and the motion was further supported by affidavits filed May 17, 1938. May 19 defendants made a motion to dismiss the petition which was denied. The question to be decided is whether the uncontradicted facts as stated in the petition and affidavits justified the order entered. Plaintiff contends that the facts were insufficient. The law applicable to a proceeding of this kind is well settled. The filing of the petition amounts to the beginning of a new suit. Only errors of fact may be corrected. These are limited to such as do not contradict the record which were unknown to the court at the time judgment was rendered and which, if known, would have precluded the entry of the judgment. (Mitchell v. King, 187 Ill., 452; Domitski v. American Linseed Co., 221 Ill., 161; Smyth v. Wargo, 307 Ill., 370; Harris v. Chicago House Wrecking Co., 314 Ill., 570; Jacobson v. Ashkinaze, 337 Ill., 141; McCord v. Briggs, 333 Ill., 159; Marabia v. Mary Thompson Hospital, 309 Ill., 147.

The facts made to appear are that the original suit of plaintiff was begun September 11, 1935, and was for injuries said to have been sustained October 8, 1933. Defendant appeared,

answered and averred a veritorious defense. After suit was filed no proper notice to put the cause on a trial calendar was filed by plaintiff and the suit did not appear on any printed trial calendar in September, 1936. A special trial calendar was prepared by the clerk of the court on which the cause was placed and it was called February 2, 1938, when it was dismissed for want of prosecution. February 8, 1938, plaintiff caused notice to be served on defendants that on February 10, 1938, he would appear before Judge McKinley and ask to have the cause reinstated. Attorney for defendants appeared in response to the notice and was informed by the minute clerk that no order had been entered as the files could not be found. No further notices were served, but February 16, 1938, plaintiff's attorney procured an order reinstating the cause and placing it on the trial calendar. February 17, defendants' attorney was informed by letter that the order of dismissal had been vacated and the cause placed on a call to be made later when it would be set for trial. This letter enclosed a trial notice such as was used in the Superior court to notice a case to be placed on a printed calendar. Thereby defendants were led to believe the case would be on the printed calendar to be called in 1938. March 14, 1936, defendant in the County court was adjudged insane and committed; he was released July 20, 1936, as having improved. Defendants did not know of the judgment until execution was served April 25, 1938.

Two errors of fact are disclosed which, if known to the court, would have precluded the entry of this ex parte judgment. The first is the reinstatement of the cause without further notice on February 16, 1938. The other is the uncontradicted fact that at the time judgment was rendered John F. Dolan, one of the defendants, had been adjudged in the County court to be insane. It was to correct error of fact such as that of rendering judgment against

no proper notice to the court on a trial date for the trial
by plaintiff and the trial date was set for the trial
calendar in September, 1933. A trial date calendar was prepared
by the clerk of the court on this date and placed in the
calendar for February 2, 1933, and it was indicated that the trial
date. February 2, 1933, plaintiff cannot decide to be served on
defendant that on February 10, 1933, at which time the trial date
calendar was not to have the same indicated. A copy of the
calendar appeared in response to the notice and was returned by
the minute clerk that no order had been entered on the trial date
not be found. No further notice was served, but February 10,
1933, plaintiff's attorney entered an order restraining the calendar
and the trial date was set for the trial date.
attorney was informed by letter that the order of dismissal had
been vacated and the court placed on a trial date for the trial
it would be set for trial. This latter calendar is trial date
as was used in the calendar court to notice a case to be tried on
a printed calendar. Plaintiff's calendar was not to believe the
case would be on the printed calendar to be called in 1933. After
14, 1933, defendant in the county court was returned under the
calendar; he was released July 30, 1933, as having answered. De-
fendant did not know of the judgment until execution was served
April 23, 1934.
Two errors of fact are disclosed when it is known to the
court, which have produced the entry of this ex parte judgment.
The first is the misstatement of the cause without further notice
the time judgment was rendered (John E. Doherty, one of the defendants,
had been added in the county court to be issued. It was to
correct error of fact such as that of rendering judgment against

an insane person, a minor or feme covert, etc., that the original writ of error coram nobis was designed. All the cases are to that effect. The affidavits filed in support of the motion further disclosed that plaintiff, as a matter of fact, prior to the rendition of the judgment had settled the claim upon which her suit was based for a consideration received by her. The rendition of judgment under such circumstances was in the nature of a fraud, of which (we assume) the attorney who took the judgment was without knowledge.

The court rightly granted the relief demanded by the writ and the judgment is affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

40409

CHARLES NADENIK,

Appellee,

vs.

APPEAL FROM CIRCUIT

COURT OF COOK COUNTY.

GEORGE E. NADENIK, Individually and as
Administrator de bonis non with the Will
annexed of the Estate of Anna Cejka, deceased,
FRANK NADENIK, MARY DOUBEK, ANNA KLAUS and
THE FIRST NATIONAL BANK OF CICERO, ILLINOIS,
a Corporation, Executor,
Appellants.

299 I.A. 613

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

July 27, 1935, Anna Cejka departed this life in Cook County, Illinois. About December 5, 1935, a writing purporting to be her last will and testament was admitted to probate and letters issued to the First National Bank of Cicero named as executor. The bank declined to act and February 11, 1936, George E. Nadenik was appointed administrator de bonis non with the will annexed. May 28 plaintiff filed his complaint averring the purported signature of Anna Cejka to the writing was not genuine; that at the time of the execution thereof Anna Cejka was not of sound mind and memory, and that the purported will was not her will; that its execution was brought about "by undue acts" and fraudulent practices. The complaint prayed the supposed will be declared null and void. The heirs at law and next of kin intervened and became defendants. The cause was put at issue and tried by jury. At the close of all the evidence the proponents made a motion for a directed verdict in their favor, which was denied. The jury returned a verdict that the instrument was not the will of the deceased. A motion for a new trial was overruled, and May 26, 1936, a decree was entered in conformity with the verdict of the jury. Defendants appeal.

Defendants submit 14 proposition of law and argue as a matter of law that the testator was at the time of the execution of the writing of sound mind and memory; that their request for an

IN RE: ESTATE OF ANNA GEJKA

VS.

COURT OF COMMON PLEAS

ADMINISTRATIVE ORDER
 ORDER OF THE COURT OF COMMON PLEAS
 IN RE: ESTATE OF ANNA GEJKA, DECEASED
 FRANK NADENIK, PETITIONER
 THE FIRST NATIONAL BANK OF CHICAGO, INC.,
 A CORPORATION, RESPONDENT
 Appellants.

2991A.618

MR. JUSTICE LATOWITZ DELIVERED THE OPINION ON THE COURT.

July 27, 1935, Anna Gejka departed this life in Cook County, Illinois. About December 2, 1932, a writing purporting to be her last will and testament was admitted to probate and letters issued to the First National Bank of Chicago named as executor. The bank declined to act and February 11, 1936, George N. Nadenik was appointed administrator of her estate and with her will annexed. Plaintiff filed his complaint averring the purported signature of Anna Gejka to the writing was not genuine; that at the time of the execution thereof Anna Gejka was not of sound mind and memory, and that the purported will was not her will; that the execution was brought about by undue acts and fraudulent practices. The complaint prayed the proposed will be declared null and void. The heirs at law and next of kin intervened and became defendants. The cause was put at issue and tried by jury. At the close of all the evidence the proponents made a motion for a directed verdict in their favor, which was denied. The jury returned a verdict that the testament was not the will of the deceased. A motion for a new trial was overruled, and May 26, 1936, a decree was entered in conformity with the verdict of the jury. Defendants appeal.

Defendants submit 14 propositions of law and argue as a matter of law that the proposed will is the will of the deceased and that the same is valid and should be admitted to probate and letters issued thereon.

instructed verdict should have been granted. The plaintiff contends the evidence offered presented an issue of fact which is settled in his favor by the verdict of the jury approved by the court.

Anna Cejka at the time of her death was about 80 years of age; she was a widow without child or children or descendants of any child or children; she owned a home at 1318 South 61st avenue in Cicero; the house had two floors; she lived on the second; the first floor was occupied by Elizabeth Schroeder who testified for defendants; Mrs. Cejka was a Bohemian and used that language; she understood English; for about 22 months prior to her death she was attended by a maid, Miss Irene Durina; the home on the second floor was shared by Mrs. Cejka with two cousins, first with her cousin Edward Vavrinek, who died in 1934, and afterward with his brother Theodore, who died in 1936. The plaintiff, Charles Nadenik, is a nephew of deceased; his wife is a sister of Cyril Matey ("boy friend" of Irene Durina); Irene says Cyril first asked her if she would take the job of caring for Mrs. Cejka; she took it and remained in the home five weeks after the death of her employer; she is, she says, engaged to be married to Cyril "if I want to." George Nadenik and Frank Nadenik are nephews of Mrs. Cejka; Dr. John Kropacek was her physician from March, 1934, up to the time of her death. The writing purporting to be her will was executed June 12, 1935. It directs the First National Bank of Cicero as executor to sell the home and pay to Mary Doubek \$300, to Anna Klaus \$100; all the residue to be divided among her nephews, Charles Nadenik, George Nadenik and Frank Nadenik. The purported will has only a cross in the place where the name of the testator would appear. The name of the testatrix is not written in her own or in the handwriting of any person. The instrument is witnessed by Bessie Hajek, Dr. Harry R. Hoffman and Irene Durina. An attorney, Mr. McCaffrey, was present and asked the

instructed verdict should have been granted. The plaintiff contends the evidence offered presented an issue of fact which is settled in his favor by the verdict of the jury approved by the court.

Anna O'Brien at the time of her death was about 30 years of age; and was a widow without child or children or descendants of any child or children; she owned a home at 1313 South First Avenue in Chicago; the house had two floors; she lived on the second; the first floor was occupied by Elizabeth Schneider who resided for domestic; Mrs. O'Brien was a Roman Catholic and used that language; she understood English; for about 25 months prior to her death she was attended by a maid, Miss Irene Darrin; she came on the second floor was shared by Mrs. O'Brien with two cousins, first with her cousin Edward Vavrinek, who died in 1934, and afterwards with his brother Theodore, who died in 1938. The plaintiff, Charles Kadank, is a nephew of deceased; his wife is a sister of Cyril Kasey ("Doc" friend" of Irene Darrin); Irene says Cyril first asked her if she would take the job of caring for Mrs. O'Brien; she took it and remained in the home five weeks after the death of her employer; and as, she says, engaged to be married to Cyril "in I want to." George Kadank and Frank Kadank are nephews of Mrs. O'Brien; Dr. John Kropacz was her physician from March, 1934, up to the time of her death. The writing purporting to be her will was executed June 12, 1935. It directs the First National Bank of Chicago as executor to sell the home and pay to Mary Donohue \$300, to Anna Eliza \$100; all the residue to be divided among her nephews, Charles Kadank, George Kadank and Frank Kadank. The purported will has only a cross in the place where the name of the testator would appear. The name of the testator is not written in her own or in the handwriting of any person.

The instrument is witnessed by Bertha Lajek, Dr. Harry A. Hoffman and Irene Darrin. An attorney, Mr. McCaffrey, was present and asked the

witnesses to sign the writing. It revokes other testamentary papers. The testatrix had prior to this time, on May 11, 1934, executed another will; it bears her signature and is under seal; it is witnessed by George J. Tourek, James J. Wolfe and Theodore Vavrinek, and was filed with the clerk of the Probate court of Cook county August 6, 1935. This former will names Charles Nadenik as executor, gives to the nephew Frank Nadenik \$100, to George \$100, to Anna Klaus \$100, to Mary Doubek 1/8 of the residue, and all the rest and residue to Charles Nadenik. Tourek, who was for some years attorney for the testatrix and who represented her in many matters, drew this former will. He testified that about a month before she died he went to her home with Charles Nadenik, who said he had been informed by his brother that Mrs. Cejka wanted to draw another will; he says Mrs. Cejka when he entered the house did not know who he was; she looked at him but did not talk; Charles Nadenik asked testatrix if she knew who he (Tourek) was; she said she did not know; Charles then told her this was George Tourek, to which she replied, "Oh, that's the doctor," and Charles said, "No, that is the lawyer." Tourek testified that he had seen her ten or twelve times within the previous year; that he observed a great change in Mrs. Cejka in that at this time she did not know anyone and did not speak intelligently.

Dr. Kropacek testified that he observed the mental condition of the testatrix in 1934 and 1935; that she failed gradually; that he observed this first about June; that when he came in she would not know him unless he was introduced by the maid or by Theodore Vavrinek. She had a heart condition for which he was treating her and complained of pain in legs and arms; he was there daily from 1st of June, 1935, until the 23rd; she had urinesis and was not able to control elimination; he was there in June when Charles Nadenik and Mr. McGaffrey, the lawyer, were there; they wanted to draw a new will; he was asked by

witnessed to sign the will. It never was other than a document.
papers. The testatrix had asked to have the will, on May 1, 1934,
executed another will; it never was signed and is never seen;
it is witnessed by George J. Lomax, James J. White and Lorraine
Vavrinek, and was filed with the clerk of the Probate Court of Cook
County, Illinois, on May 1, 1934. This document was destroyed by
executor, given to the nephew Frank Lomax, 5100, to George Lomax,
to Anna Lomax, 5100, to Mary Lomax 1/8 of the residue, and all the
rest and residue to Charles Lomax. Lomax, who was her son, gave
attorney for the testatrix and was represented her in every matter,
gave this Lomax will. He testified that about a month before she
died he went to her home with Charles Lomax, who said he had been
informed by his brother that Mrs. Lomax wanted to give another will;
he says Mrs. Lomax when he entered the house did not know who he was;
she looked at him but did not talk; Charles Lomax asked testatrix
if she knew who he (Lomax) was; she said she did not know; Charles
then told her this was George Lomax, to which she replied, "No,
that's the doctor," and Charles said, "No, that's the lawyer."
Lomax testified that he had seen her for of twelve times within the
previous year; that he observed a great change in Mrs. Lomax in
that at this time she did not know anyone and did not speak intelligi-
bly.
Dr. Knapp testified that he observed the mental condition
of the testatrix in 1934 and 1935; that she talked incoherently; that
he observed this first about June; that when he came in she would not
know him unless he was introduced by the name of Dr. Knapp Vavrinek.
She had a heart condition for which he was treating her and complained
of pain in legs and arms; he was there daily from 1st of June, 1935,
until the 22nd; she had urticaria and was not able to control elimin-
ation; he was there in last week of June and the following week;
Lomax, testatrix, and Charles Lomax were a new will; he was called to

Mr. McCaffrey whether Mrs. Gejka was in a condition to answer questions at that time and he replied she was not.

The evidence of Tourek, Dr. Kropacek, Miss Durina, Virginia Nadenik, W. J. Smith and Albert Michals indicates a condition of testatrix precluding possibility of mental capacity to execute a will on June 12, 1935, while Bessie Hajek, Dr. Harry R. Hoffman and Elizabeth Schroeder gave testimony tending to show testamentary capacity.

Dr. Hoffman testified at length to an examination given by him to Mrs. Gejka just prior to the execution of the will, in which he says that Mrs. Gejka responded intelligently to questions he asked her as to how many dimes it took to make a dollar and similar questions; he spoke to her in English and she answered in English; she told him that her husband was dead; that she had two children dead and that one of the children's name was "Mary." Irene Durina was called in, interpreted in Bohemian, and Dr. Hoffman inquired as to how testatrix was feeling, and Irene told him she had difficulty in seeing out of the right eye; Dr. Hoffman says testatrix was seated comfortably in a chair and at times would get up and walk into the kitchen; when he began his examination he asked Mr. McCaffrey to close the door and everybody left the room except the interpreter; she knew dates, the seasons, the time of day, whether she had any relatives, past illnesses, whether her people were against her, whether she knew who was President, whether she knew the men that were there; he made no physical examination; he saw Mrs. Hajek and Miss Durina and the other women sign the paper; he thinks they saw him sign it; he was not interested in the matter; was there to make a mental examination; he says she told him she was born in 1860 or thereabouts; he says she indicated an impaired memory in that she did not know exactly the year of her birth. Dr. Hoffman visited testatrix at the request of lawyer McCaffrey,

Dr. McArthur testified that Galt was in a condition to answer

questions at that time and he recalled the way in which

The evidence of Galt, Dr. McArthur, Miss Galt, Virginia

W. G. Smith and Albert L. Smith indicated a condition of

scientific procedure, possibility of actual evidence, to establish

with on June 12, 1938, while Galt was in the hospital and

Alfred Galt, was found only to be in a condition to answer

Dr. McArthur

Dr. McArthur testified that Galt was in a condition given by

him to Mrs. Galt prior to the execution of the will, in which

he says that Mrs. Galt presented herself to him as a witness

asked her as to how many times he took the money in his hand and

questions; he spoke to her in English and she answered in English;

she told him that her husband was dead; that she was a widow

and that one of the children's names was "Mary". Mrs. Galt

was called in, accompanied by Mrs. Galt and Dr. McArthur

as to how Galt was feeling, and Mrs. Galt told him that Galt

only in seeing out of the right eye; Dr. McArthur says

was seated comfortably in a chair and at times would get up and walk

into the kitchen; when he was in the examination he asked her to

Galt to close the door and everybody left the room except the

lawyer; she knew better, the person, the time of day, whether

she had any relatives, and Galt, whether her people were

against her, whether she knew who was present, whether she knew

the man was very young; he made no physical examination; he saw

the doctor and the nurse and the other woman sign the paper; he

thinks they saw him sign it; he was not interested in the matter;

was there to make a mental examination; he says she told him she was

born in 1860 or thereabouts; he says she indicated an impaired

memory in that she did not know exactly the year of her birth.

Dr. McArthur visited Galt at the request of lawyer McArthur.

who drove him to the home in an automobile. Dr. Kropacek was not notified and was not present.

Mrs. Schroeder says that she saw Mrs. Cejka in 1933, 1934 and 1935, but did not notice any difference in her condition; she paid her rent to her in 1935 and received receipts from her down to the month of June; a number of the receipts she says were signed by a cross only; she did not produce any of these receipts.

Mrs. Hajek says she saw Mrs. Cejka sign and that Mrs. Cejka saw her sign her name; the doctor and lawyer were present when she signed; Irene Durina was not there at that time but came later; she says the testatrix seemed to be all right and of sound and disposing mind and memory at the time she placed her mark on the instrument.

On any possible theory of law the issue here was of fact for the jury. An examination of the evidence discloses to some extent the desire of witnesses on both sides to exaggerate. The jury saw the witnesses and the trial Judge saw and heard them testify.

The decree is affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

was above him in the morning at 7:30. The witness was not
noticed and was not present.
The witness says that he was not present on July 1, 1933,
and 1933, but the next morning July 1, 1933, he was present;
and he was present on July 1, 1933, and 1933, and 1933,
to the date of June 1, 1933, and 1933, and 1933,
signed by a person only; and the next morning July 1, 1933,
the witness says that he was not present on July 1, 1933,
and he was present on July 1, 1933, and 1933, and 1933,
signed; and he was present on July 1, 1933, and 1933,
says the witness seems to be all right and of sound mind and disposing
mind and memory at the time and place and date on his statement.
On any possible theory of law the issue here was of fact
for the jury. The examination of the evidence disclosed to some
extent the basis of the witness on the date of the statement. The
jury saw the witness and the witness saw the witness and the
witness.

The witness is attested.

WITNESSES.

Respectfully, J. B. O'Connell, J. B. O'Connell, J. B. O'Connell.

40278

IDA SLAVIK et al.,

vs.

CENTRAL TRUST COMPANY et al.

191A
APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

On Appeal of EMMA DICUS

299 L.A. 613

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

The suit in the instant case was originally brought to construe an alleged will of Henry Scherer, deceased, in which the Central Trust company was named as executor. The will was set aside by a decree of the Superior court of Cook county and the administration of the estate was transferred from the Probate to the Superior court. This appeal is by Emma Dicus, one of the heirs of Henry Scherer, deceased, from an order entered July 12, 1938, denying her motion to expunge paragraphs 8 and 9 of an order entered March 31, 1937.

The record discloses that on July 19, 1934, an order or decree was entered on the report of a master in chancery that the administrator within two days pay to Emma Dicus \$9000 as a part of the distributive share of the estate. The administrator prayed an appeal to this court (No. 38044) which was on motion dismissed. Afterward, on August 31, 1934, another order was entered that the administrator pay to Emma Dicus \$4000; there is some uncertainty whether this was in addition to the \$9000 or in lieu of it. From that order the administrator prayed an appeal to this court (No. 37913) but the appeal was dismissed. Sometime later Emma Dicus and others, as conservatrices of an incompetent distributee, brought suit in the Municipal court against the administrator and his surety in which there was a verdict and judgment in defendant's favor, and Emma Dicus and others appealed to this court (No. 38597) where the judgment was affirmed and leave to appeal to the Supreme

... ..

court was denied by that court. Afterward the administrator, having failed to comply with the order of August 31, 1934, was removed from office and committed for contempt and a successor administrator was appointed. The matter of settling the administrator's account was referred to a special commissioner, and after a hearing the court on March 31, 1937, entered a decree which recited in considerable detail what had been done in the matter; that on July 19, 1934, the administrator was ordered to pay Emma Dicus \$9000; that another order was entered August 31, 1934, directing the administrator to pay Emma Dicus \$4000 by way of distribution; that the administrator having failed to make the payments was committed to jail for contempt. The order or decree of March 31, 1937, then continues and finds: "as now appears from the subsequent proceedings *** Dicus (the administrator) did not on July 19, 1934, have in his possession as a part of the assets of * * * the estate" \$9000 with which to make the payment and that he did not have the \$4000 with which to make the other payment to Emma Dicus; that the administrator who succeeded John B. Dicus, the original administrator, presented his report from which it appears that Dicus, as administrator, had \$2369.17 which with certain other securities he turned over to his successor; that the surety company on the bond of Dicus offered to pay to the successor administrator \$2523.57, that the order was entered accordingly and that amount paid. The contempt proceeding was set aside and vacated as to Dicus, the administrator. The court found he had paid over to his successor all the money in his hands, and the attempt of Emma Dicus and others to litigate in other courts was enjoined, for the reason that the Superior court had full jurisdiction. From this order or decree Emma Dicus and others prosecuted appeals, but they were not perfected and all were dismissed.

January 7, 1938, Emma Dicus filed what she designates a

"Motion" in which she seeks to have expunged from the order or decree of March 31, 1937, paragraphs 8 and 9, which vacated the orders directing Dicus, the administrator, to pay the \$9000 and the \$4000, as above stated, and enjoined Emma Dicus and the other heirs from prosecuting in any other court any suit against the former administrator or his surety because the Superior court had full jurisdiction. The only reason given by Emma Dicus in her motion of January 7, 1938, is her allegation that the court was wholly without jurisdiction in March, 1937, to set aside the orders entered in 1934 for the payments of \$9000 and \$4000, and was without jurisdiction to enjoin the litigation as above stated. We think there is no merit in either of these contentions. The Superior court in administering the estate found that there was error in ordering Dicus, the administrator, to pay the \$9000 and the \$4000 as ordered in 1934, because he did not have the money. Obviously the Superior court had jurisdiction of the estate and could adjust the accounts to speak the truth. Long, Adm'x. v. Thompson, 60 Ill., 27; Finne v. Schumacher, 65 Ill. App., 342; Conant v. Elgin City Banking Co., 232 Ill. App., 156. There was no error in ordering the injunction because it is not disputed that Dicus, the administrator, and his surety, had properly accounted for all the money coming to Dicus's hands as administrator.

Emma Dicus filed her notice of appeal from the order of March 31, 1937, which she permitted to be dismissed. She cannot afterward, in the absence of any fraud, accident or mistake, have the order or decree of March 31st reversed in these circumstances, and especially since there is no attempt to show that what was done was in any way irregular. It is essential that litigation be terminated.

The order of the Superior court of Cook county appealed from is affirmed.

ORDER AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

HARRY E. RICHARDS, JAMES H. RICHARDS, JAMES
RICHARDS and MARIAN RICHARDS, his wife, JOHN A.
RICHARDS and MARIAN RICHARDS,

(appellees).

JOHN D. HARRIS, ARTHUR KAY, JAMES
HARRIS and CHARLES W. FORTS, CHARLES W.
FORTS, RUSSELL FORTS, JEROME F. FORTS, in-
dividually and as members of the General
Bondholders Protective Committee for Bonds
sold by American Bond & Mortgage Company
and as Voting Trustees under the various
Trusts established by the Committee; ROBERT
ROBERTS, KENNETH W. ROBERTS and CHARLES B. ROBERTS,
individually and as officers and directors of
the American Bond & Mortgage Company, and
AMERICAN TRUST & SAFE DEPOSIT COMPANY, FIRST
NATIONAL BANK OF CHICAGO, (designated as
"Principal Defendants"), CONTINENTAL MORTGAGE
LOAN CORPORATION; BURNS-ROBT & COMPANY, a
corporation; HOTEL ALCAZAR, INC.; LINCOLN-
ROBT CORPORATION; JACKSON PARK HOSPITAL
COMPANY, a corporation; 20 EAST CHASE STREET INC.;
1061 WEST BURLING STREET CHICAGO; 5040
WASHINGTON STREET CHICAGO; 5237 DIVISadero STREET CHICAGO;
ING CORPORATION; DONNELL ARMSTRONG, INC. and
"UNKNOWN OWNERS", (designated as "Nominal
defendants"),

Appellees.

CIRCUIT COURT
COOK COUNTY.

299 I.A. 613

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiffs, as owners of \$16,800 in face amount of bonds
of eleven separate bond issues underwritten by defendant, the
American Bond & Mortgage company (the aggregate face amount of
nine of such issues being in excess of \$5,174,000) filed their
complaint in chancery claiming there was fraud on the part of
some of the defendants in the execution and sale of the bonds;
that there was a "conspiracy or scheme" on the part of all of the
defendants in and about the handling of the properties conveyed
to secure the payment of some of the bonds; some of it in fore-
closure, and the reorganization of other of the properties; that
plaintiffs bring the suit "in their own behalf and for the use and
benefit of all other bondholders who are similarly situated". The

1. *Journal of the American Medical Association*, 1997; 277: 1033-1038.

doi:10.1017/S0022292414000094 Printed in the United Kingdom © 2014 Cambridge University Press

AMERICAN BIRD & WILDLIFE CONSERVATION (1960-1961) 100

[illegible]

some of the telephone in the conversation with the witness;

to the "to you" and the "answer to your question" a new great deal

...and it is not to be used as a basis for the determination of the amount of the award.

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prayer was that defendants, (a) be restrained from encumbering, transferring or assigning any of the properties; that a receiver be appointed to manage and operate the properties; that defendants attorn to the receivers then in control; that the books and records be turned over to the receiver; (b) that the court decree the principal defendants disqualified, and that they be removed and competent persons appointed; (c) that the court decree the principal defendants guilty of malfeasance and misfeasance and liable to the bondholders for the damages caused, and that a joint and several judgment be entered upon a proper accounting; (d) that the principal defendants be required to account; that the creation of the committee "resulting in the reorganization schemes was part of a fraudulent conspiracy"; (e) that the receiver be appointed and directed to notify all beneficiaries to file their claims "if they desire to avail themselves of the benefits thereof and to contribute to the expense", and (f) for such further relief as to equity may seem proper.

Defendants filed separate motions to dismiss the complaint for a number of specified reasons. The motions were sustained, the complaint dismissed "for want of equity at plaintiffs' costs" and they appeal.

The substance of the complaint which we deem necessary to state for the purpose of this decision is that defendant, American Bond Mortgage Company was engaged in financing construction loans for the purpose of making large commissions, placing insurance on the properties and charging interest on undischarged funds during the period of construction; that to secure the funds "it devised a scheme to float first mortgage bond issues" and to sell them to the general public; that defendants, Harold, Kenneth and Charles Moore were the principal officers and directors and in

active charge of the business; that for the purpose of having complete control of each bond issue so that in the event of default no individual bondholder could take action, the Bond Company organized defendant, American Trust & Safe Deposit Company for the purpose of acting as trustee in the various bond issues in which exclusive right of action was vested; that the Moores controlled this company and were its principal officers and directors; that to induce the public to buy the bonds, false information was given as to the several properties to be constructed, their income, etc.; that plaintiffs purchased bonds issued and sold by the Mortgage & Trust Company on eleven buildings, (naming them) which were constructed by the Mortgage and Trust Companies; that a prospectus issued on the Churchill Hotel stated the bond issue of \$930,000 was secured by a first mortgage on the property which was valued at \$1,367,500, with a gross annual income of \$395,000; that the issue was guaranteed by the president of the borrowing company, and that provision was made for payments on the loan, but that the mortgage was not a first lien, a large amount of taxes being unpaid; that a prospectus on the Albion Shore Hotel stated the bond issue of \$365,000 was secured by a first mortgage on property valued at \$615,000, with a net annual income of \$57,694; the Alcazar Hotel prospectus stated that the bond issued was \$400,000; that a similar prospectus was issued as to the other eight buildings; that plaintiffs, relying upon such information, bought bonds in ten issues; that without knowledge to plaintiffs, some of the buildings were not completed through lack of funds; the makers of the bond issues deserted the property in the midst of construction and mechanics' liens were filed, foreclosure proceedings were instituted by the trustee, and the income of the completed buildings was used for the purpose of paying foreclosure expenses; that "in many instances the bonds were sold to the plaintiffs and to the other investors during

the pendency of the foreclosure proceedings without ever informing the investors that the bond issues were in default"; that the Mortgage Company and the Trust Company concealed the defaults from plaintiffs and other investors and advanced their own funds to pay principal and interest without the knowledge of the investors; took up the bonds uncanceled and held them on a parity with other bonds; that "in many instances" the Mortgage Company and Trust Company, in anticipation of defaults, would call in bonds prior to maturity and exchange them for other bonds; that the bonds so acquired were pledged as security "with various banks including defendant, First National Bank of Chicago" and the liability to the banks in this connection was approximately \$3,000,000 for which the bonds were pledged and that this was done to conceal defaults from the investors; that after the crash of September, 1929, the bonds pledged to the banks were greatly depreciated and it appeared that the Mortgage Company and the Trust Company could not remain in business; that to save them "defendants conspired to deprive plaintiffs" from their rights and remedies against the Mortgage and Trust Companies, and thereupon "defendants created an alleged bondholders' protective committee under a deposit agreement" dated October 24, 1929, for the ostensible purpose of protecting the investors but for the real purpose of protecting themselves; that the First National Bank agreed to finance the "project" and advanced \$250,000 to the committee to solicit the bondholders to deposit their bonds and lent the services of some of its officials who were placed on the committee; that representatives of the Chicago Trust Company, another bank, and of the Central Republic Bank were also placed on the committee; that having accomplished their "scheme" they caused letters to be mailed by the Mortgage Company to the investors stating the bonds could not be paid and submitting a plan of reorganization, etc.; that the committee placed advertisements in the newspapers suggesting the deposit of bonds with the committee; that

the First National Bank continued to advance funds to the committee in furtherance of the "scheme".

The Bill then sets up the various plans for the reorganization of the properties, etc., and then particularizes (a) Albion Shore Hotel Plan was adopted March 30, 1936, bond issue of \$365,000 all in default since March 9, 1939, a new corporation to be organized etc., the stock to be distributed to the bondholders and others; (b) The Alcazar Hotel Plan adopted July, 1935 but not accomplished until October, 1936; that in connection with this building, the mortgage foreclosure fees were \$14,500. The reorganization plan then follows: (c) Churchill Hotel Plan adopted March, 1936. The complaint describes the plan and states that the committee was to receive \$32,250, besides foreclosure expenses and fees in excess of \$15,000; (d) Harbor View Apartments, \$667,500 outstanding bonds. Then follows what was done. (e) Jackson Park Hospital, that a new corporation was created to acquire the property, etc.; (f) Lincoln Rebeby Building, the reorganization of which was completed October, 1937, that there were \$827,400 outstanding bonds, with more than \$400,000 unpaid interest, etc.; (g) 20 West Cedar Apartment plan adopted in 1933, new corporation formed, outstanding bonds \$1,465,000, etc.; (h) Rosemont Building Corporation reorganized in 1931; (i) Washington Corporation reorganization plan in 1933, giving details; (j) Diversely Arms Building Corporation plan completed in 1931; (k) Dornell Apartments, Inc., reorganization plan in 1933.

The complaint then alleges that the total bond issue floated by the American Bond & Mortgage Company consisted of 159 issues totalling an investment of \$100,000,000, and that the bondholders committee is the general committee for all these properties; that in most of the cases the reorganization was carried on without the approval of court; that in a few cases the committee submitted these reorganization plans, some to the State and some to the Federal courts. The complaint then continues and sets up in detail and at great length

what are alleged to be the facts disclosed on the hearing on the foreclosure and reorganization plans of the Churchill Hotel in a proceeding in the Circuit Court of Cook County. Similar allegations follow in reference to the Albion Shore Hotel as to what took place in a proceeding involving that hotel, in the Circuit Court of Cook County. Then follow somewhat similar allegations concerning the reorganization plan of the Harbor View apartments where a bond issue of \$900,000 was floated by the American Bond & Mortgage Company July, 1923, and a second bond issue of \$200,000; that defaults were made in 1924, 1925 and 1926 in the payment of these bonds; that there was a bond issue of \$1,475,000 against the 20 East Cedar Street apartments in 1926. Further on, the complaint sets up the finding or opinion of the Judge of the Circuit Court of Cook County in connection with the Churchill Hotel proceeding. This covers several pages of the abstract. There are several paragraphs in the complaint where the allegations are general, charging defendants with wrong-doing in that the banks protected their own interest to the detriment of plaintiffs and other bondholders, and a number of other charges of a similar character are made.

We do not state further allegations of the complaint but we think it sufficient to say that plaintiffs' suit is an attempt to recover damages for fraud and deceit by way of a class suit in eleven separate bond issues. There were decrees entered in three proceedings involving the Churchill Hotel, Albion Hotel and Lincoln Roney building. In another building, the Harbor View Apartments, a proceeding was pending under 77 in the Federal Courts. It seems clear that whatever claim plaintiffs had arising out of these four bond issues were adjudicated or could have been adjudicated in those four proceedings, and they are not in a position here to complain as to those four properties.

Defendants make a number of contentions why the decree should be affirmed, one of which is that the complaint is multi-

farious. We think this contention must be sustained. First Nat. Bank of Lincoln v. Starkey, 268 Ill. 12; Lyons v. 333 So. Mich. Bldg. Corp., 277 Ill. App. 93; Gosbi v. Taylor Packing Machine Co., 290 Ill. App. 33.

In the Starkey case, the court said, (pp. 25-27): "To lay down any rule universally applicable as to multifariousness, or to say what constitutes multifariousness as an abstract proposition, is, under the authorities, utterly impossible. (Storey's Eq. p. - 10th ed. - sec. 530.) There is no settled and inflexible rule as to deciding whether a pleading is multifarious. The question is one which must be determined largely by the circumstances of each particular case. (14 Ency. of Pl. & Pr. 195.) Under recent decisions it is frequently held that the objection of multifariousness usually raises merely a question of convenience in conducting the suit, and calls for the decision of the court simply upon the question whether, in its discretion, the various causes set forth in the bill should be tried in a single suit or should be divided and tried in two or more suits, or whether a defendant who is a necessary party in respect to some matters covered by the bill is so connected with the other matters involved as to make him a proper party in respect to them. *** In spite, however, of the absence of any general rule as to what constitutes multifariousness, it is generally held that there are certain principles and tests by which that defect may be discovered in any particular case. By multifariousness, says a noted author, is meant improperly joining in one bill distinct and independent matters and thereby confounding them. *** But what is more familiarly understood by the term 'multifariousness,' as applied to a bill, is where a party is able to say that he is brought as a defendant upon a record with a large portion of which he has no connection whatever. (1 Daniell's Ch. Pr. - 6th Am. ed. - *336.)"

Further, we think the Commission must be satisfied that the

State of Illinois is a party to the Convention.

It is, we think, a party to the Convention.

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In the Lyons case, (277 Ill. App. 93) suit was brought by a minority of bondholders against the trustee under a mortgage and also as depository under a deposit agreement and against the mortgagor and others for personal decrees for an injunction against the further prosecution of a pending foreclosure suit, etc. The bill was held to be multifarious in that it sought to liquidate several claims which were separate and distinct and joined distinct subject matters against several defendants, some of whom had no interest in one or more of the matters involved.

In the Gombi case, 290 Ill. App. 53, suit was brought by a number of purchasers of washing machines from the defendant company alleging the machines were sold by fraudulent misrepresentation and that the sales contracts were obtained by fraud. One of the prayers of the complaint was that defendant be enjoined from prosecuting actions at law on the contracts. The Appellate Court held the complaint was multifarious. The court there said, (p. 62): "Counsel for appellees, however, do call our attention to section 23 of the Civil Practice Act, *** and insist that the only question for determination is whether, if these appellees had brought separate actions, a common question of law or of fact would have arisen. This section provides: 'Subject to rules, all persons may join in one action as plaintiffs, in whom any right to relief is respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally or in the alternative, where if such persons had brought separate actions any common question of law or fact would arise.' In our opinion this provision simply extends equity practice as to joinder of parties and causes of action, to actions at law." The court then points out that section 23 was taken from a section of the New York Practice Act and was construed by the Court of Appeals of New York. (238 N.Y. 466.)

In the instant case, there are probably many hundreds of

[illegible]

IN THE COURT OF THE DISTRICT OF COLUMBIA, at the City of Washington, D.C., this 14th day of May, 1944.

JOHN EDGAR HOOVER, Special Agent in Charge, Federal Bureau of Investigation, United States Department of Justice, vs. ALGER HISS, Defendant.

Comes now the Defendant, ALGER HISS, and files and moves the following:

1. A Motion to Dismiss the Complaint, and

2. A Motion to Allow the Defendant to Withdraw the Complaint.

And moves the Court to grant the Defendant's motions, and for such other and further relief as the Court may deem proper.

Subscribed and sworn to before me at the City of Washington, D.C., this 14th day of May, 1944.

Notary Public for the District of Columbia.

[illegible]

bondholders who purchased their bonds in the same manner as plaintiffs purchased their bonds from the Mortgage Company and under the same facts. Millions of dollars worth of such bonds are involved in the suit, at least nine large properties are involved, numerous issues would necessarily arise as to each bond issue and the fact there was but one bondholders' agreement would not change the situation. As said in the Starkey case, (268 Ill. 22) multifariousness raises a question of convenience in conducting a suit. One of the tests is the "improperly joining in one bill distinct and independent matters and thereby confounding them". Whether a complaint is multifarious, we think, should in most cases be left to the discretion of the chancellor and only become a question of law when all reasonable minds would reach the conclusion that the matters were so involved that they should not be tried in one suit.

In the instant case we think the complaint was multifarious and the court properly struck it.

The order or decree of the Circuit Court of Cook County appealed from is affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

HOME OWNERS' LOAN CORPORATION,
a Corporation of the United
States of America, Created by
Act of Congress,

Defendant in Error,

vs.

SIGNE NIELSEN,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

299 11 813

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

The Home Owners' Loan Corporation brought an action of forcible detainer against defendant to recover possession of an apartment in a building in Chicago. There was a hearing before the court without a jury and a finding that defendant was "guilty of unlawfully withholding from plaintiff possession of the premises." The court entered judgment on the finding but ordered the writ of restitution stayed for sixty days. Defendant has sued out a writ of error to this court to reverse the judgment.

We think it appears that plaintiff obtained title to the premises through a foreclosure proceeding and afterward brought this forcible detainer suit in the Municipal court. The contention of defendant seems to be that the real party in interest was the Government of the United States, not the Home Owners' Loan Corporation; that the money lent and to secure the payment of which the mortgage on the property was given, belonged to the United States Government, and therefore the right of action was not in plaintiff.

Plaintiff has assigned cross-errors, contending the court was not warranted in ordering the writ of restitution stayed for sixty days, and further argues that a writ of error will not lie in a forcible detainer case. We know of no authority that would warrant the court in staying the writ of restitution for sixty days, but since we have reached the conclusion that a writ of error will not lie and the proceedings must therefore be dismissed, we do not

UNITED STATES OF AMERICA
v.
[Name of Defendant]
Defendant in Error

THE
COURT
OF
COMMON PLEAS

IN SENATE CHAMBERS, JUDGE OF THE COURT

The Court (Judge) now proceeding to the trial of the
forensic detector against defendant as recover possession of an
apartment in a building in Chicago. There was a hearing before
the court witness a jury and a finding that defendant was "guilty"
of unlawfully withholding from plaintiff possession of the premises.
The court entered judgment on the finding and ordered the writ of
restitution stayed for sixty days. Defendant was sent out a writ
of error as this court is now in session.

To this is added that plaintiff retained a law firm to
proceed through a law firm to prosecute the defendant through
this forensic detector until in the highest court. The corporation
of defendant seems to be that the writ of error was the
Government of the United States, not the one owned by John Doe
tion; but the money was used to secure the payment of which the
mortgage on the property was given, belonged to the United States
Government, and therefore the right of action was not in plaintiff.
Plaintiff was assigned cross-examination, commencing the court

was not warranted in ordering the writ of restitution stayed for
sixty days, and further argued that a writ of error will not lie
in a forensic detector case. We know of no authority that would
warrant the court in staying the writ of restitution for sixty days,
but since we have reached the conclusion that a writ of error will
not lie and the proceedings must therefore be dismissed, we do not

discuss further the contentions of the respective parties.

In Wentworth v. Sankstone, 233 Ill. App., 48, it was held a writ of error would not lie to review a judgment entered in a forcible detainer case. That holding was approved in City of Chicago v. Chicago Steamship Lines, Inc., 328 Ill., 309.

The writ of error is dismissed.

WRIT DISMISSED.

McSurely, F. J., and Matchett, J., concur.

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WILLIAM BURKE HARMON, RUSSELL
 TYSON, ARTHUR LYMAN and BENNETT
 MILNOR, Trustees,

Appellees,

vs.

MICHELE VINCI,

Appellant.

APPEAL FROM CIRCUIT COURT
 OF COOK COUNTY.

299 I.A. 614¹

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

October 9, 1936, plaintiff's filed their complaint in chancery to restrain defendant from remodeling a building and praying that he be required to remove it from the premises. After the issues were made up the cause was referred to a master in chancery who took the evidence, made his report, recommended that a decree be entered in accordance with the prayer of the bill and that defendant be required to remove the building from the premises within six months unless within that period he remodeled the building in accordance with plans approved by plaintiff's. A decree was accordingly entered and defendant appeals.

Plaintiff's have filed no brief in this court.

The record discloses that plaintiff's, the owners of about 100 acres of farm land located in the southerly part of Chicago between 127th street and approximately 129th street and east of Halsted street, subdivided the property and in November, 1927, sold 12 of the lots to defendant for \$11,250 - a down payment of \$1125 and the balance in monthly installments of \$150 each. In January, 1928, defendant on paying \$9000 cash was given a discount from the purchase price so that the lots cost him a total of \$10,125, and February 3, 1928, he was given deeds to the 12 lots which contained building restrictions that prior to January 1, 1940, defendant would not erect or permit to be erected on the

WILLIAM MURPHY HALL, JR.,
TYSON, ARTHUR L. H. and
TYSON, ARTHUR L. H.

ARIZONA STATE COURTS

OF COCHISE COUNTY

299 L.A. 614

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

October 9, 1936, Plaintiff's filed their complaint in
 Chancery to restrain defendant from the selling a building and
 praying that he be required to remove it from the premises.
 After the issues were made up the cause was referred to a master
 in chancery who took the evidence, made his report, recommended
 that a decree be entered in accordance with the prayer of the bill
 and that defendant be required to remove the building from the
 premises within six months unless within that period he removed
 the building in accordance with plans approved by plaintiff. A
 decree was accordingly entered and defendant appealed.
 Plaintiff's have filed no brief in this court.
 The record discloses that plaintiff's, the owners of about
 100 acres of farm land located in the southerly part of Chicago
 between 127th street and approximately 128th street and east of
 Harvard street, subdivided the property and in November, 1927,
 sold 12 of the lots to defendant for \$11,280 - a down payment of
 \$1125 and the balance in monthly installments of \$180 each. In
 January, 1928, defendant on paying \$3000 cash was given a discount
 from the purchase price so that the lots cost him a total of
 \$10,125, and February 3, 1928, he was given deeds to the 12 lots
 which contained building restrictions that prior to January 1,
 1940, defendant would not erect or permit to be erected on the

lots any building except a dwelling. If the house was for one family it was to cost not less than \$7500 and must not have a flat roof; if the dwelling house was constructed for two families it was to cost not less than \$12,000 and be not less than two stories in height, to be built of brick or stone and might have a flat roof; that all buildings were to have foundations of brick, stone, concrete or cement blocks; that the premises should not be used for carrying on any trade or business, and the plaintiff trustees reserved the right to modify the restrictive covenants.

Some time thereafter the parties entered into an undated agreement which purports to be a bill of sale of an old house located on the subdivided property about three or four blocks west of the lots purchased by defendant. The old house was given to defendant and by the terms of the agreement he was authorized to remove it to one of his lots at his own expense. The agreement further provided that no alterations or changes should be made in the old building before plans and specifications were submitted to and approved by plaintiff's; and further, defendant agreed to start work on such alterations or changes within 30 days after the sewer and water mains had been installed by plaintiff's in Eggleston avenue, the street on which defendant's 12 lots faced. There was a further provision that if the remodeling of the building had not been started within the 30 day period after the sewer and water mains were installed, it was agreed "that the old building will be considered an unsightly structure and a detriment to the surrounding property," and Vinci agreed to remove it at his own cost; that if it were not removed within 60 days from the time required by the Realty Trust, the owner of the property, the Realty Trust might demolish it at defendant's expense. The cost of all permits were to be borne by defendant.

The contract, which appears to be typewritten, contains a

lots any building except a dwelling. If the house was torn and
family it was to cost not less than \$7500 and must not have a flat
roof; if the dwelling house was constructed for two families it
was to cost not less than \$12,000 and be not less than two stories
in height, to be built of brick or stone and must have a flat
roof; that all buildings were to have foundations of brick, stone,
concrete or cement blocks; that the premises should not be used
for carrying on any trade or business, and the plaintiff reserved
reserved the right to modify the restrictive covenants.
Some time thereafter the parties entered into an amended
agreement which purports to be a bill of sale of the house
located on the subdivided property about three or four blocks west
of the lots purchased by defendant. The old house was given to de-
fendant and by the terms of the agreement he was authorized to
remove it to one of his lots at his own expense. The agreement
further provided that no alterations or changes should be made in
the old building before plans and specifications were submitted to
and approved by plaintiff; and further, defendant agreed to start
work on such alterations or changes within 30 days after the sewer
and water mains had been installed by plaintiff in the location
shown, the street on which defendant's lot faced. There was
a further provision that if the remodeling of the building had
not been started within the 30 days after the sewer and water
mains were installed, it was agreed "that the old building will be
considered an unsightly structure and a detriment to the surround-
ing property," and Vinet agreed to remove it at his own cost; and
if it were not removed within 30 days from the time required by the
Realty Trust, the owner of the property, the Realty Trust might de-
mand it at defendant's expense. The cost of all permits were to
be borne by defendant.
The contract, which appears to be typewritten, contains a

paragraph which was stricken by drawing lines through each of the typewritten lines; that paragraph is as follows: "SECOND: Inasmuch as the purpose of moving said building to lots 1 to 5 in Block 9 is to use it as the skeleton or frame work only for a brick building to be used for residential purposes, the said purchaser agrees to submit plans and specifications of the remodeled building for written approval as required by the restrictions on his property before July 1, 1928." There is a dispute as to whether this paragraph was stricken before or after it was signed by defendant, but we think this question is not of controlling importance. The undisputed evidence is that Vinci moved the old house or barn and placed it on one of his lots in the winter of 1927-28. The expense of moving was \$1500 which he paid. In March, 1928, Vinci installed windows in five rooms of the building, caused partitions and floors to be installed at an expense of \$915. In August, 1930, he connected the premises with sewers and water, constructed a bathroom and a catch basin at an expense of \$350; in April, 1932, "Roof boarding repaired and entirely reroofed, doors fixed. Cost \$375." In May, 1933, foundations were built, excavations, concrete basement floor, concrete in garage portion, chimney basement to roof, at a cost of \$2009; in August, 1935, he installed an electric light plant in the building at a cost of \$650; in April, 1936, he divided the rooms, making a dining room, a bedroom and a bath, for which he paid \$225 - a total cost to him of \$6024.

The undisputed evidence also tends to show that throughout the period of time defendant was moving and repairing the building plaintiffs had a representative who was on the ground practically every day. As stated, the property was vacant farm property and there were very few buildings constructed on the lots and no building of any consequence was taking place during the depression, so that the building program was practically at a standstill. In

paragraph which was written by drawing lines through each of the typewritten lines; that paragraph is as follows: "Enclosed: Insurance as the purpose of moving said building to lot 1 to 2 in block 2 is to use it as the location of home work only for a brick building to be used for residential purposes, the said purchaser agrees to submit plans and specifications of the remodelled building for written approval as required by the restrictions on his property before July 1, 1934." There is a dispute as to whether this paragraph was written before or after it was signed by defendant, but we think this question is not of controlling importance. The undisputed evidence is that Finch moved the old house on lot 1 and placed it on one of his lots in the winter of 1927-28. The expense of moving was \$1800 which he paid. In March, 1928, Finch installed windows in live rooms of the building, caused partitions and floors to be installed at an expense of \$215. In August, 1928, he connected the premises with sewer and water, constructed a bathroom and a catch basin at an expense of \$350; in April, 1929, "Roof boarding repaired and entirely renovated, doors fixed. Cost \$100. In May, 1929, installation of new plumbing, cost \$100. In June, 1929, concrete in garage portion, chimney placed to roof, at a cost of \$200; in August, 1929, he installed an electric light plant in the building at a cost of \$60; in April, 1930, he divided the rooms, making a dining room, a bedroom and a bath, for which he paid \$285 - a total cost to him of \$5024.

The undisputed evidence also tends to show that throughout the period of time defendant was moving and repairing the building plaintiff had a representative who was on the ground practically every day. As stated, the property was vacant from property and there were very few buildings constructed on the lots and no building of any consequence was taking place during the depression, so

In

addition to the moneys paid by Vinci as above stated he also paid plaintiff trustees \$35 a lot, or \$420, as his proportionate share for the care of parkways, planting trees, etc.

The sewer and water mains mentioned in the agreement or bill of sale were installed by plaintiffs by September, 1930, and on the 26th of that month they wrote defendant advising him of this and stating they thought he should proceed with the remodeling of his building in accordance with the agreement without further delay. From that time on the matter was taken up between the parties and their respective counsel; letters passed between them and conversations were had with a view of reaching an agreement; apparently nothing came of them and the work of remodeling was from time to time carried on by defendant.

A number of points are made by defendant as to the exclusion of evidence, - that plaintiffs refused to approve proper plans for remodeling the building, that plaintiffs are guilty of laches and that it would be highly inequitable to require defendant to remove the building or to remodel it as plaintiffs suggest at large additional cost when the building restrictions, by their own terms, will expire within less than a year - January 1, 1940. We think this contention must be sustained. Defendant started to move the building in the winter of 1927-28 and for a number of years thereafter was remodeling it at great expense. While objections were from time to time made, plaintiffs did not file their complaint until October, 1936, nearly eight years after the property was sold, building moved and extensive remodeling done. This delay, we think, constitutes laches. Brandenburg v. Country Club Bldg. Corp., 332 Ill., 136; DeGama v. D'Aquila, 101 Atl. (S.J.Ch.)1028.

In the Brandenburg case a bill was filed for a mandatory injunction to compel the removal of a building or for the remodeling of it. The court there in considering the remedy which was sought

in addition to the money paid by Wind as there shall be also said
plaintiff's interest 223 a lot, or 2430, and his proportionate share
for the care of the house, including taxes, etc.

The house and water rights included in the agreement of
bill of sale were included by plaintiff by September, 1930, and

on the 20th of that month they were delivered to defendant and at
this time stating they thought he should proceed with the remodeling

of this building. Defendant then and there agreed to do so
and that time on the matter was taken up between the

parties and their respective counsel; letters passed back and forth
and conversations were had with a view of reaching an agreement;

apparently nothing came of them and the work of remodeling was
from time to time carried on by defendant.

A number of points are made by defendant as to the rendition
of evidence - that plaintiff's refusal to answer proper questions for

remodeling the building, that plaintiff's refusal to remove
that it would be highly inadvisable to require defendant to remove

the building or to remodel it as plaintiff's request to remodel is
thence cost when the building was destroyed by their own fire,

will expire within less than a year - January 1, 1940. We think
this contention must be sustained. Defendant wanted to move the

building in the winter of 1937-38 and for a number of years there-
after was remodeling it at great expense. While objections were

from time to time made, plaintiff did not file their complaint
until October, 1938, nearly eight years after the fire.

and, building moved and extensive remodeling done. This delay,
we think, constitutes a bar. Remodeling of Building

Remodeling of Building, 101 Cal. (1932).
The remodeling was a bill of sale for a building

information to correct the record in a building of the remodeling
of the building was a bill of sale for a building

said: "The remedy is subject to the defense of laches - the neglect of the person who knows his right to have been wrongfully invaded to take action with reasonable promptness to protect his right and stop the invasion. Any considerable delay not satisfactorily excused will bar his right to relief, particularly where he seeks by a mandatory injunction to compel the removal of a valuable structure. 'The right to enforce a restrictive agreement may be lost by laches or acquiescence, especially when this results in the making of expenditures by defendant. *** That the agreement has but a limited time to run has, in connection with other circumstances, been regarded as a consideration adverse to its enforcement.'" The court then quoted with approval from the DeGama case decided by the New Jersey court. In that case a person knowing that a building restriction was being violated by the construction of a garage by a neighbor, made no objection until the construction was near completion, and afterward waited for over a year before filing a bill for a mandatory injunction. Our Supreme court quoted with approval ⁱⁿ the Brandenburg case the following from the New Jersey court: "It was the complainant's duty, if she intended to insist upon an enforcement of the restrictions, to have acted promptly after she learned of their actual violation by defendant in April and before he had expended any considerable sum of money on the building. * * * It is one of the rules of a court of equity quite strictly enforced on a bill for a mandatory injunction to protect restrictive building covenants, that the application must be promptly made. Complainant's delay, under the circumstances, in taking legal proceedings to protect her rights constitutes such laches that I deem it inequitable to grant her ^{the} relief she now seeks." And our Supreme court continuing quotes from the New Jersey case the following: "And generally, whenever plaintiff stands idly by and permits the erection complained of to be made and expenses to be incurred therein without objecting, his application for

...The remedy is subject to the terms of the ... the ...
...of the person who knows his rights to have been wrongfully invaded
...to take action with reasonable promptness to protect his rights and
...stop the invasion. Any considerable delay not necessarily ...
...costs will be his right to relief, particularly where he seeks by
...a mandatory injunction to compel the removal of a valuable structure.
...The right to enforce a restrictive covenant may be lost
...by failure or acquiescence, especially when this results in the
...making of expenditures by defendant. ... that the agreement has
...not a limited time so run here, in connection with other circumstances,
...been regarded as a consideration adverse to its enforcement
...ment." The court then quoted with approval from the ... case
...decided by the New Jersey court. In that case a person knowing
...that a building restriction was being violated by the construction
...of a garage by a neighbor, made no objection until the construction
...was near completion, and afterwards waited for over a year before
...filing a bill for a mandatory injunction. The Supreme Court quoted
...with approval the following from the New Jersey
...court: "It was the complainant's duty, if she intended to insist
...after she learned of their actual violation by defendant in April
...and before he had expended any considerable sum of money on the
...building, to file an action or a bill for a mandatory injunction to protect
...restrictive building covenants, and the application must be
...promptly made. Defendant's delay, under the circumstances, in
...failing to do so is imputed to her acquiescence and the restriction is
...lost." And generally, whenever plaintiff stands idly by
...and permits the erection completed or to be made and expenses

the aid of a court of equity comes too late and will not be entertained."

We are further of opinion that under the rule which is referred to as "Balance of Convenience" the mandatory injunction issued in the instant case ought not to stand. Hill v. Kimbell, 269 Ill., 398. The court in that case said: "In cases where mandatory injunctions are asked for, 'it is the duty of the court to consider the inconvenience and damage that will result to the defendant as well as the benefit to accrue to the complainant by granting of the writ, and where the defendant's damages and injuries will be greater by granting the writ than will be the complainant's benefit by granting the writ, or greater than will be complainant's damages by the refusal of it, the court will, in the exercise of a sound discretion, refuse the writ.' * * * It is not every case of a permanent obstruction to the use of an easement that entitles the aggrieved party to a restoration of the former situation. Each case depends on its own circumstances. The courts, in the exercise of a sound discretion, must determine in such instances whether a mandatory injunction shall issue."

The lot in question on which the building was placed by defendant is located near railroad tracks and seems not to be as desirable as the property further west where in 1937 there appears to have been under construction 35 residences by virtue of the Federal Housing law.

For the reasons stated the decree of the Circuit court of Cook county is reversed and the cause remanded with directions to dismiss the suit.

REVERSED AND REMANDED WITH DIRECTIONS.

McSurely, P. J., and Matchett, J., concur.

the aid of a court of equity seems to have been already obtained."

the exercise of a sound discretion, what damages in such instances
tion. Each case depends on its own circumstances. The courts, in
entitled the aggrieved party to a restoration of the former situa-
every case of a permanent obstruction to the use of an easement that
exercise of a sound discretion, refuse the writ. It is not
complainant's damages by the return of it, the court will, in the
plaintiff's benefit by granting the writ, or greater than will be
justice will be proper by granting the writ then will be the con-
granting of the writ, and where the defendant's damages will be in-
detriment as well as the benefit to accrue to the complainant by
to consider the inconveniences and losses that will result to the
mandatory injunctions are asked for, it is the duty of the court
280 Ill. 393. The court in that case said: "In cases where

The lot is situated on which the building was placed by defendant is located on the west side of the street and is bounded on the north by the street and on the south by the street and on the east by the street and on the west by the street. The lot is situated on which the building was placed by defendant is located on the west side of the street and is bounded on the north by the street and on the south by the street and on the east by the street and on the west by the street.

For the reasons stated the decree of the district court of the Southern District of New York is reversed and the case remanded with directions to the court to conduct the trial.

McCarthy, P. J., and Johnston, J. J., 1969, p. 10.

DEARBORN-LAKE GARAGE, INC.,
Appellant,

vs.

SOL D. GOLBY,

Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

2991A614²

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against defendant to recover \$56.13 claimed to be balance due on a chattel mortgage made by defendant. Defendant denied liability and filed a counterclaim for \$1000 for the unlawful detention by plaintiff of defendant's automobile. There was a trial before the court without a jury, a finding against plaintiff on its claim, finding for defendant on his counterclaim for \$250; judgment was entered on the findings and plaintiff appeals. Defendant has filed no brief in this court.

The record discloses that plaintiff was the owner of a chattel mortgage given on defendant's automobile to secure his indebtedness. Plaintiff foreclosed the chattel mortgage and a balance of \$56.13 over the proceeds of the sale was claimed to be due. Defendant testified that the automobile belonged to him; that the license for it was issued to his wife under her maiden name; that he was a private detective; that his place of business was at 119 North Clark street and was known as the "Illinois State Detective Agency." The evidence further shows that defendant kept his car in plaintiff's garage, the account charged to the Detective agency, and that at the time in question there was due plaintiff for garage service and repairs a balance of \$265.

The evidence is further to the effect that payments under the chattel mortgage were due monthly and that a payment of \$23.31 fell due March 28, 1938. Golby testified that he saw a representative of plaintiff on that date and, "I told him that there was a

UNITED STATES DISTRICT COURT

OF THE DISTRICT OF COLUMBIA

vs.

JOHN D. GORDY,

Defendant.

MR. JUSTICE OF THE DISTRICT COURT OF THE DISTRICT OF COLUMBIA

Plaintiff's motion for summary judgment is hereby denied.

It is ordered that the case be set for trial on or before the 15th day of June, 1936.

Plaintiff's motion for summary judgment is hereby denied. Defendant's motion for summary judgment is hereby denied.

Plaintiff's motion for summary judgment is hereby denied. Defendant's motion for summary judgment is hereby denied.

Plaintiff's motion for summary judgment is hereby denied. Defendant's motion for summary judgment is hereby denied.

Plaintiff's motion for summary judgment is hereby denied. Defendant's motion for summary judgment is hereby denied.

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Plaintiff's motion for summary judgment is hereby denied. Defendant's motion for summary judgment is hereby denied.

due date on the note, that I wanted to pay it. I also wanted to pay \$25 on account provided he released the car, on account of the Illinois State Detective Agency. He said he would take the money provided I would give him the chattel mortgage on the car and personally absolving the indebtedness of the corporation. That would be about four hundred and some odd dollars"; that he refused to do as plaintiff's representative requested and that plaintiff refused to let defendant have the car unless he paid up.

The court found defendant had tendered the proper amount due under the chattel mortgage on March 28 but that the tender was refused.

Plaintiff's representative testified there was no tender made and consequently no refusal. We think the finding is contrary to the manifest weight of the evidence, and moreover, we think the tender was not such as the law requires. There was no actual tender of money or check. Under the circumstances this was insufficient. Moreover, according to defendant's own testimony the tender was conditionally made; he testified he agreed to pay provided plaintiff would release the car, which it refused to do. We see no reason why the car should have been released at that time since there was due plaintiff \$265 for garage service, including some repairs.

Plaintiff further contends that in any view of the case there was no evidence to warrant the court in fixing the value of the automobile, which the court apparently did at \$450, allowing defendant credit for \$200 which it received at the foreclosure sale. We think the contention must be sustained. The only evidence as to the value of the car was that given by defendant, who testified on the trial, held June 28, 1935, that he bought the car in November, 1935, and paid \$347 for it; that he had driven it about 48,000 miles; that it was a 1936 model. On this evidence the court fixed the value of the car at \$450. This was not warranted by the evidence. The judgment of the Municipal court of Chicago is reversed and judgment is entered in this court in favor of plaintiff for the amount

of its claim, \$56.13.

JUDGMENT REVERSED AND JUDGMENT
ENTERED IN THIS COURT.

McSurely, P. J., and Matchett, J., concur.

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2. 1990年12月15日，在《人民日报》发表署名文章《中国要实行“三民主义”》，攻击中国共产党领导的多党合作和政治协商制度，攻击社会主义制度，攻击社会主义精神文明，攻击社会主义物质文明，攻击社会主义政治文明，攻击社会主义文化文明，攻击社会主义生态文明，攻击社会主义社会文明，攻击社会主义人类文明，攻击社会主义世界文明，攻击社会主义宇宙文明，攻击社会主义一切文明。

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40687

HIBBARD, SPENCER, BARTLETT &
COMPANY, a Corporation,
Appellant,

vs.

CITY OF CHICAGO, a Municipal
Corporation,
Appellee.

APPEAL FROM CIRCUIT COURT
OF CHICAGO.

2991A 614³

MRS. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

In a condemnation proceeding brought by the City of Chicago for the purpose of widening and improving certain streets in Chicago there was a verdict and judgment in plaintiff's favor, fixing the amount of just compensation to be paid for its property taken at \$3,900,000. Judgment was entered for this amount on August 7, 1924. September 30, 1925, the City paid the judgment but no interest although interest was demanded.

In the instant case plaintiff claims \$207,458.18, being 5% on the judgment from August 7, 1924, to September 30, 1925, and also claims interest on the \$207,458.18 from the latter date until judgment is entered in the instant case. These facts were alleged in plaintiff's amended complaint. Defendant, the City of Chicago, moved to dismiss the suit for the reason that the amended complaint on its face showed that plaintiff's claim was barred by the 5 year Statute of Limitations. The motion was sustained, the suit dismissed and plaintiff prosecuted an appeal to the Supreme court of this State. The Supreme court found that the case "was wrongfully appealed to this court as this court is without jurisdiction," and transferred the case to this court.

A number of points are made by counsel for plaintiff, the purpose of which is to have the Supreme court reconsider its holding in the case of Blakeslee's Warehouses v. City of Chicago, 369 Ill. 480. In that case, where the claim made was similar to the claim

of plaintiff in the instant case, it was held that the action was barred under the provisions of Sec. 15 of our Limitation Act, within five years.

In the Blakeslee case after a judgment entered in a condemnation proceeding was paid by the City, the owner of property condemned, more than 5 years after the payment of the judgment brought ~~judgment~~ suit against the City for interest on the full amount of the judgment from the date it was entered to the date when payment was made, and for interest on such unpaid interest after the date of the payment of judgment. The court held this claim was barred 5 years after the judgment was paid, and said (p. 482): "The record conclusively shows the claim is for interest, and being for interest, only, she could in no event recover interest on interest. The trial court and the Appellate court correctly so held. If she is entitled to recover interest at all, it is only upon \$54,554 from the date the judgment was entered to the date it was paid. Blaine v. City of Chicago, 366 Ill., 341." The court there further said (p. 485): "Section 15 of the Statute of Limitations provides that actions on unwritten contracts, awards of arbitrators, or to recover damages for injury to property, or to recover possession of or damages for the detention or conversion of personal property and all civil actions not otherwise provided for, shall be commenced within five years next after the cause of action accrued." And it was held that the action was barred by the 5 years and the judgment of the Appellate court (292 Ill. App., 288) was affirmed. Obviously the holding of the Supreme court is binding on this court. Feldman v. City of Chicago, 276 Ill. App., 142.

The judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

McSurely, P. J., and Hatchett, J., concur.

of plaintiff in the instant case, it was held that the action was barred under the provisions of Dec. 18 of our Limitation Act, which five years.

In the Shelton case after a judgment entered in a condemnation proceeding was paid by the City, the owner of property concerned, more than 5 years after the payment of the judgment from the City for interest on the full amount of the judgment from the fact it was entered to the date when payment was made, and for interest on such unpaid interest until the date of the payment of judgment. The court said this claim was barred 5 years after the judgment was paid, and said (p. 188): "The court conclusively shows the claim is for interest, and being for interest,

only, it could in no event recover interest on interest. The trial court and the appellate court both held it was barred. It is only upon \$24,834.33 that the date the judgment was entered to the date it was paid, Shelton v. City of Chicago, 232 Ill. 211. The court there held that (p. 432): "Section 18 of the Statute of Limitations provides that actions on written contracts, written acknowledgments, or to recover damages for injury to property, or to recover possession of or

damages for the detention or conversion of personal property and all civil actions not otherwise provided for, shall be commenced within five years next after the cause of action accrued." And it was held that the action was barred by the 5 years and the judgment of the Appellate court (232 Ill. App. 232) was affirmed. Only the holding of the Appellate court is binding on this court.

Shelton v. City of Chicago, 232 Ill. App. 232.
The judgment of the Circuit court of Cook County is affirmed.
JUDGMENT AFFIRMED.

39382

JAMES W. BRENN,

Appellant,

vs.

CITY OF CHICAGO et al.,

Appellees.

APPEAL FROM SUPREME COURT

OF COOK COUNTY.

299 F. 814

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff filed a petition against the City of Chicago, the chief Justice and 15 of the associate Justices of the Municipal court of Chicago asking for an attorney's lien; he claims that something over \$9000 is due him from these Judges for his services in obtaining from the Supreme court a writ of mandamus ordering the City of Chicago to pay the Judges portions of their statutory salaries which had been withheld on account of the City's financial condition during the depression years of 1932, 1933 and 1934. Notice of claim of lien was given the City, which filed an answer alleging, among other things, that plaintiff cannot maintain an action against the City of Chicago to enforce an attorney's lien, claiming the City was not subject to the provisions of the Attorney's Lien statute, Ill. Rev. Stats., 1937, chap. 13, par. 14, sec. 1.

The amended petition asserted that at a meeting of the Municipal court Judges held June 30, 1933, they unanimously agreed to join with Judge Lyle in court proceedings to collect back salaries; that plaintiff should be their attorney and that they would contribute to his fees and expenses. Defendants filed answers denying any contract, express or implied, or any knowledge that he represented them, and also denying that the sum claimed was reasonable.

Trial was had before the court without a jury, which held plaintiff had not proved the alleged employment, and a decree was entered finding the issues with the defendants, that plaintiff did not have any lien against any moneys due to defendants in the hands

W. H. HARRIS

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STATE OF NEW YORK

IN SENATE,

January 10, 1900.

REPORT

OF THE

COMMISSIONERS OF THE LAND OFFICE

IN RESPONSE TO A RESOLUTION PASSED BY THE SENATE, APRIL 1, 1899,

AND BY THE ASSEMBLY, APRIL 1, 1899,

RELATIVE TO THE LANDS BELONGING TO THE STATE.

ALBANY:

THE UNIVERSITY OF THE STATE OF NEW YORK, 1900.

PRINTED BY THE UNIVERSITY OF THE STATE OF NEW YORK, 1900.

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of the City, and his petition and amended petitions were dismissed at plaintiff's costs. From this order he appeals.

In its decision the trial court held, in substance, that plaintiff relies upon an implied contract of employment; that the evidence to support this is ^{the} vagrant conversations of plaintiff with various of/defendants in which there was no direct reference to the extent of plaintiff's employment or the defendants' liability for fees; that the evidence consists of affirmance by plaintiff and denials by the defendant Judges, and therefore the court could not say that plaintiff had proved his case by the preponderance of the evidence. Moreover, that where there are two or more parties, plaintiff or defendant, to a law suit but not all of the parties have employed an attorney, the remaining parties cannot be held liable for any part of such attorney's services merely because they knew such services were being rendered, and that they would benefit by the success of the proceedings.

In the years 1932, 1933 and 1934, during the depression, the City of Chicago was having difficulty in collecting taxes and found it impossible to pay all city employees their regular salaries; it made reductions in its appropriations for these, including the salaries of the Municipal Court Judges; there was a deficiency in the appropriation for these salaries of 48 days pay for 1932, 73 days pay for 1933, and 52 days pay for 1934.

Most of the Judges acquiesced in the first deficiency, understanding that it was temporary, but when in June, 1933, the appropriation ordinance provided for a 73 day deduction some of the Judges demurred to this. It was the consensus of opinion ^{of} the Judges that the City had no right to compel any deduction in their statutory salaries and that the acceptance of a reduction was upon the understanding that when the City was in good financial condition they could collect the amounts temporarily withheld. In The People v.

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City of Chicago, 351 Ill., 396, opinion filed in February, 1933, it was held in effect that statutory salaries could not be reduced during the term of office.

While the Judges, generally, were willing to cooperate with the City, Judge Lyle refused to authorize the City to make any deductions from his salary. A meeting of the Judges was held about June 30, 1933, at which the matter of the deductions from the salaries was discussed.

Plaintiff testified that in June, 1933, he had been retained by Judge Lyle to institute suit for him; that afterward Lyle brought plaintiff into a conference with Chief Justice Sonstebj regarding the situation; that on June 30, 1933, plaintiff attended at Sonstebj's office, who went into an adjoining room and upon his return said to plaintiff that a meeting had just been held, attended by 24 of the Judges, and they were all willing to join in Lyle's action; that as plaintiff was leaving Sonstebj's office Judges Madden, Schiller and Rooney said to plaintiff they were glad he had been picked to handle the case.

Plaintiff first filed a suit in the Superior court seeking to enjoin the City from withholding payment of salaries; the suit was filed in the name of Judge Lyle alone; subsequently it was amended, making the other Judges co-plaintiffs, with the names of the Judges attached, signed by Lyle, purporting to be their agent. This bill also purported to be filed on behalf of other officials of the City, including the mayor, the city comptroller, the city treasurer, the city clerk, the heads of all the city departments and all members of the city council, and the prayer for relief was the same for all of them. No evidence was introduced upon the trial of the instant case that plaintiff had any arrangement for fees with these other city officials, although he claimed to have sought relief in their behalf.

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Defendants persuasively suggest that this proceeding indicates that plaintiff was retained by Judge Lyle alone.

The record is full of evidence concerning alleged statements by various Judges indicating that they had an understanding with plaintiff that he should represent them. Judge Lyle testified that he talked with Judges Schiller and McCarthy and Scheffler and that each of them said, in substance, that plaintiff would be taken care of. Each of these Judges denied these conversations.

Plaintiff argues that the testimony of Judges Graber, Melander and Erickson supports his employment. Judge Graber was confused in his testimony that plaintiff was in the Judges' meeting on June 30, 1933; this is not in accord with that of any other witness, including plaintiff. Judge Melander testified that Judge Lyle said at this meeting he was going to employ plaintiff to represent him to get his pay and said, "If you fellows don't go along with me I am going to start my proceedings myself." Judge Erickson also testified that at the meeting in June Lyle showed determination to file a suit. It would make this opinion much too long to itemize the testimony of the defending Judges contradicting all statements purporting to have been made by plaintiff or Judge Lyle, authorizing plaintiff to represent them in any legal proceedings. Chief Justice Bonstedy at considerable length testified and denied categorically the testimony of plaintiff and of Judge Lyle touching any employment of plaintiff in the matter.

The trial court was evidently impressed by the fact that the evidence was conflicting and was reluctant to find specifically as to which witness was testifying truthfully and which testified otherwise. The court took refuge in the rule that the plaintiff is bound to prove his case by the preponderance of the evidence, and held plaintiff had failed in this respect.

In this court we frequently invoke the well known rule that

the trial court, who sees and hears the witnesses, is much better able to determine the credibility of the witnesses than is a court of review. It is axiomatic that the opportunity of the trial court to pass upon the questions of credibility is much greater than that of a court of review. The Papple v. Overbey, 362 Ill., 488, 491-92, where it was said that where the evidence is conflicting the court of review will not substitute its judgment for that of the trial court. See also Page v. Reeves, 362 Ill., 64, 72, and Schrader v. Schrader, 293 Ill., 469, 475. In Hall v. Pittenger, 365 Ill., 135, 136, it was said that the findings of the trial court would not be disturbed "unless manifestly and palpably wrong."

The mandatory injunction proceeding brought in the Superior court was taken to the Supreme court (Lyle v. City of Chicago, 357 Ill., 41) where it was pointed out that the proper practice in such a case was by mandamus, and that the complainants had misapprehended their remedy; subsequently an original petition for mandamus was filed in the Supreme court seeking to compel the authorities of the City of Chicago to appropriate and pay the amounts withheld from the Municipal court Judges; the proceedings ran in the name of The People ex rel. John M. Lyle, and a number of other relators. (360 Ill., 25). It was there held that it was the duty of the City authorities to make the necessary appropriations for the full amount of the salaries of the relators. Shortly thereafter the instant petition to enforce an attorney's lien was filed and served upon the City.

Examination of the record leads to no clear conclusion that we cannot hold the findings of the trial court adversely to plaintiff with respect to any express contract of employment of plaintiff by the Judges were manifestly and palpably wrong.

Plaintiff argues that the defending Judges had knowledge of the pendency of the litigation, made no objection to it, and accepted the benefits derived. We think there can be no doubt that the Judges knew of the mandamus suit brought in the Supreme court and acquiesced

in this, but it does not follow that they are bound by any implied contract to pay for the services of plaintiff. They knew the result would have been the same if the proceedings were continued in the name of Judge Lyle alone. In many cases in this State the claim of an implied liability has been denied. In Chicago, St. C. & E.R. Co. v. Larned, 26 Ill., 218, an attorney had been expressly employed by one of several parties interested in certain land to represent him in litigation; he brought suit for attorney's fees against one of the other parties who had known of the litigation, was a party to it and had received the benefit of the services; the court held he could not recover, saying that while the defendant's conduct "may have been ungenerous" there was no legal liability on his part. The court also said, "it would be a most dangerous precedent to hold that because the defendant had sat silently by and let counsel employed by another argue a cause which if won would secure his interest, therefore he agreed to pay the counsel in proportion to the benefit thus received." In Walker v. Brown, 28 Ill., 378, 386, under somewhat similar circumstances, where plaintiff sought to recover on a quantum meruit, it was held that there was no implied contract on the part of the defendant to pay for the services, "notwithstanding the work was beneficial to him, and he stood by without objecting to its being done on his premises." Jones v. Spencer, 75 Ill. App., 349, 353; Grossberg v. Knight, 266 Ill. App., 133; Northwestern M. & L. Academy v. Wadleigh, 267 Ill. App., 1, 3. Cases from other jurisdictions are to the same effect.

Plaintiff quotes at some length from Thornton on Attorneys at Law, sec. 518, but this author cites, under section 519, the Larned case, supra, saying that "it is equally well settled, however, that one person cannot make another his debtor without his consent, either express or implied; and, therefore, the mere fact that professional services inure to the benefit of one who did not contract for

in fact, but it is not the fact that they are limited
to the fact that they are limited to the fact that they are limited

would have been the same if the proceedings were conducted in the
name of the state. In such cases, it is not the fact that they are limited

an implied liability has been created. In Johnson v. Johnson, 200
U.S. 1, 21, an attorney had been expressly employed by
one of several parties interested in certain land in Tennessee. In
litigation, he brought suit for recovery of the land and was
not other parties and had shown to the satisfaction of the court that

it had received the benefit of the services, and could not be
could not recover, saying that the fact that the land was
have been understood, there was no legal liability on the part.

The court also said, "It would be a very dangerous proposition to
hold that because the defendant was not directly or indirectly
interested in certain land, he was not liable for the same."

interest, because he did not pay for the same. In Johnson v. Johnson, 200
U.S. 1, 21, an attorney had been expressly employed by one of several parties
interested in certain land, he was not liable for the same."

cover of a number of cases, it was said that there was no implied
contract on the part of the defendant to pay for the services, but
that the fact that the defendant was not directly or indirectly

interested in the land, he was not liable for the same. In Johnson v. Johnson, 200
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them, or consent to their rendition in his behalf, or lead counsel to believe by any word or act that he would pay for them, will not create a liability on his part for the attorney's compensation." Other quotations from the same author are to the same effect. Cases cited by plaintiff merely hold that a contract to employ an attorney need not be express, but sometimes may be implied, which doubtless is true.

Defendants make a further point, which we hold is conclusive against plaintiff. It should be remembered that plaintiff's petition is based upon services in procuring the issuance of the writ of mandamus by the Supreme court (360 Ill. 25.) Defendants say the record shows that plaintiff has already received for these services from Judges not defendants here an amount largely in excess of the fair and reasonable value of the services performed.

The record shows that the writ of mandamus commanded the City to appropriate the sum of \$180,617.92 for the purpose of paying the Chief Justice and the Associate Judges of the Municipal court the moneys due them; that many of the Judges paid the 10 per cent demanded by plaintiff for his services, aggregating \$10,515.94. He is asking from the defending Judges here additional amounts aggregating \$9,324.53, which, if allowed, would make a total of \$19,840.47 for his services in recovering, by mandamus, \$180,617.92.

Attorneys testified for plaintiff as to what would be a reasonable fee in this case. Their figures ran from 10 per cent of the amount recovered to 25 per cent. The attorneys for defendants gave their opinion on a per diem basis of \$100 a day. An experienced and well informed attorney said that there was no customary charge for such services based on a percentage basis. The testimony of the attorneys does not give a satisfactory basis on which to estimate the reasonable amount of the fee.

It is well settled that the court is not bound by the testimony of attorneys upon the question of fees but should and will

them, at present or in the future, or from whom to believe by any word or act that he would pay for them, will not create a liability on his part for the attorney's services.

Other questions from the same suit are as follows: Cases cited by plaintiff merely show a tendency to believe an attorney need not be employed, but no conclusion can be drawn, which defendant is true.

Defendant makes a further point, which he will be compelled to prove. He claims to have been paid for his services. His petition is based upon possession in respect to the amount of the writ of habeas corpus by the defendant (see also, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000).

The record shows that the writ of habeas corpus was granted and

City to reimburse the sum of \$100,000.00 and the balance of the amount paid by the City for the writ of habeas corpus and the necessary expenses of the writ.

It is noted from the foregoing that the City has paid the sum of \$100,000.00, which, if allowed, would leave a total of \$100,000.00 for the City to reimburse.

Also note that the City has paid the sum of \$100,000.00.

responsibility for the same. The City has paid the sum of \$100,000.00, which, if allowed, would leave a total of \$100,000.00 for the City to reimburse.

and have their opinion on a bill filed with the City. The City has paid the sum of \$100,000.00, which, if allowed, would leave a total of \$100,000.00 for the City to reimburse.

of the attorney fees and a satisfactory basis on which to

estimate the responsibility for the same.

It is noted that the City has paid the sum of \$100,000.00.

responsibility of the City for the same.

take into consideration its own knowledge of the value of the services. Morrison v. Farmers Elevator Co., 118 Ill., 372, 378; Gentleman v. Sanitary District, 260 Ill., 317. The Judges of the Circuit and Superior courts had occasion at about the same time as is involved here to employ attorneys to recover reductions in salaries made by the County; they employed to represent them attorneys of high standing at this bar; the aggregate recovered was approximately \$100,000, and for this service the attorneys received \$3000, or approximately 3 per cent, which was considered by all as a reasonable fee for such services.

There is no contention that plaintiff had a separate agreement with each of the Judges as to the amount of his compensation. What services were rendered were rendered for the Judges collectively, and he is therefore not entitled to receive more than what such collective services were worth.

There is force in the argument that it is extremely doubtful that if an express contract had been made the amount of the fees would have been left open and undetermined. The exact amount to be recovered was certain, and also the simple method to secure this had been judicially determined by the Supreme court. As counsel for defendants say, that with all those factors before them it is doubtful that any fee agreed upon would have exceeded \$5000.

The City asks that we hold that the Attorney's Lien statute of Illinois is not applicable to it, and persuasive reasons are presented in support of this position. In view of our conclusion that the order of the lower court in dismissing the petition must be affirmed, it is unnecessary to pass upon this question at this time.

For the reasons indicated the order of the trial court is affirmed.

AFFIRMED.

Matchett, and O'Connor, JJ., concur.

take into consideration the fact that the same person has been

employed by the same person for a long time.

Employment of the same person for a long time.

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Employment of the same person for a long time.

40554

MILLER ICE COMPANY,
a corporation,

Appellant,

v.

GEORGE E. CRIM,

Appellee.

APPEAL FROM CITY COURT OF

CHICAGO HEIGHTS.

289 I.A. 615

PRESIDING
MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff filed a complaint against defendant, a former employee of plaintiff. The action was based upon a written contract dated January 13, 1936, in and by which defendant, employed by plaintiff to peddle ice from house to house in a designated territory or route, agreed that for a period of two years after he left plaintiff's employ he would not compete with plaintiff in the ice business, solicit or serve any of the customers of plaintiff, nor divulge the names of such customers to any other person. The restriction applied to the territory served by plaintiff in its ordinary business. Defendant left plaintiff's employ, and at once engaged in the ice business for himself or others, peddling ice to customers of plaintiff in the territory served by him while in plaintiff's employ, and also soliciting customers of plaintiff. A temporary injunction issued. After a trial of the cause before the court there was a finding that the contract between the parties was without consideration and a judgment order was entered dissolving the temporary injunction and dismissing the cause for want of equity. Plaintiff appeals. Defendant has not seen fit to file a brief in this court.

The written contract provides, inter alia, that defendant would not, while in the employ of plaintiff nor during the two years immediately after the termination of such employment, divulge or make known, either directly or indirectly, to any person, firm or

100-
 WILLIAM LEE COMPANY,
 a corporation,
 Appellant,
 v.
 GEORGE E. GRIM,
 Appellee.
 PRESIDING
 MR. JUSTICE ROBERT H. HANCOCK

Plaintiff filed a complaint against defendant, a former
 employee of plaintiff. The action was based upon a written con-
 tract dated January 18, 1933, in and by which defendant, engaged
 by plaintiff to peddle his firm's house in a designated
 territory or route, agreed that for a period of two years after
 he left plaintiff's employ he would not compete with plaintiff in
 the ice business, neither on route any of the employees of plain-
 tiff, nor divulge the names of such employees to any other person.
 The restriction applied to the territory covered by plaintiff in his
 ordinary business. Defendant left plaintiff's employ, and at once
 engaged in the ice business for himself or others, peddling ice to
 customers of plaintiff in the territory covered by him while in
 plaintiff's employ, and also soliciting customers of plaintiff.
 A temporary injunction was issued. After a trial of the cause before
 the court there was a finding that the contract between the parties
 was without consideration and a judgment order was entered dissolving
 the temporary injunction and dismissing the cause for want of equity.
 Plaintiff appeals. Defendant has not seen fit to file a brief in

This court.
 The written contract provides, inter alia, that defendant
 would not, while in the employ of plaintiff nor during the two
 years immediately after the termination of such employment, solicit

corporation, the names and addresses of the customers, patrons or agents of plaintiff; that for two years immediately following the termination of his employment with plaintiff defendant would not, either directly or indirectly, for himself or any other person, firm or corporation, call upon, solicit, divert or take away, or attempt to solicit, divert or take away, any of the customers or patrons of plaintiff whom defendant had called upon, solicited or served during his employment with plaintiff; that for a space of two years after the termination of his employment defendant would not, either directly or indirectly, for himself or for any other person, firm or corporation, engage or enter into the ice business in the territory described in the contract, being the city of Chicago Heights and the village of Steger, in Cook county, the villages of Crete and Beecher in Will county, and the village of Grant Park in Kankakee county, Illinois.

It appears that just before the signing of the contract one of plaintiff's drivers, Ralph Miller, left its employ and immediately started an ice business of his own, and solicited and took away from plaintiff customers that Miller had served while in the employ of plaintiff. On January 18, 1936, an official of plaintiff corporation called in its employees, including defendant, who were engaged in peddling ice, and informed them as to what Miller had done and told them that in order to protect the interests of plaintiff company and to prevent a repetition of such conduct by any of its other drivers, each of the remaining drivers must sign a written contract if he desired to keep his job; that any driver refusing to sign such contract would be discharged. Each of the drivers was presented with a written contract similar to the one that defendant signed, and after the drivers had read the same each signed the contract that applied to him. Defendant worked under the written contract he signed until April 25, 1938.

That the contract was reasonable in point of time and territory

employment, the names and addresses of the persons, in order to
agents of plainity; that for two years immediately following the
formation of the employment with plainity following would not
either directly or indirectly, for himself or any other person, this
or corporation, with good, reliable, direct or indirect agency or through an
agent, direct or indirect, any of the members of the family of plain-
ity when formation had failed upon, reliable or direct contact with
employment with plainity; that for a period of two years after the
formation of the employment following would not, directly or indirectly, or
indirectly, for himself or for any other person, this or corporation,
or any of the members of the family of plainity following in
the contact, being the city of Chicago, Illinois and the village of
Steger, in Cook County, the village of Grove and Woodstock in Will-
county, and the village of Mount Park in Hamilton County, Illinois.
It appears that just before the signing of the contract and
of plainity's drivers, John Miller, left his engine and immediately
started on the business of his own, and attached and took away from
plainity's engine that Miller had moved while in the engine of
plainity. On January 15, 1915, at Chicago at plainity's direction
called in the employees, including plainity, who were engaged in
repairing the, and informed them as to what Miller had done and to in-
form them in order to protect the interests of plainity's company and
to prevent a repetition of such conduct by any of its other drivers,
each of the remaining drivers sent with a written statement of the
desired to keep his job; that any driver returning to work after such
such would be discharged, each of the drivers who presented with a
written contract similar to the one that defendant signed, and when
the drivers had read the same each signed the contract that signed
to them. Defendant worked under the written contract for a long time.

April 27, 1915.

was not disputed, and it was conceded that defendant violated the terms of the contract, and the sole question for us to determine is, Was there a sufficient consideration for the contract.

The theory of defendant in the trial court was that since there was no change in the wage, hours or working conditions of defendant after he signed the contract, there was no consideration for the contract and it was, therefore, unenforceable. Plaintiff admits that there was no change in defendant's wages, hours or working conditions after the signing of the contract, but claims that the contract was valid and enforceable because (1) "The mutual promises made by and between the parties in the contract constitute a sufficient consideration therefor; and (2) The plaintiff told the defendant that it would discharge him immediately if he did not sign this contract, and such forbearance from discharge, under such circumstances, is consideration for the contract, and in effect amounts to a re-employment of the defendant."

In Ryan v. Hamilton, 205 Ill. 191, there was involved the question as to whether or not a contract not to engage in a particular business was founded upon legal consideration, and (at pp. 197-8) the court said: "In all such cases it is not the business of a court to inquire whether the consideration is adequate or of equal value to that which the party loses by the restriction. In cases of this character it is impossible for courts to tell how valuable to the complainant or how injurious to the defendant may be the restraint sought to be imposed. It is sufficient to uphold such contracts if the court arrives at the conclusion that there is, as a matter of fact, some legal consideration; but the adequacy of the consideration is within the exclusive dominion of the parties where they contract freely and without fraud." (Italics ours.) A number of other Illinois cases to the same effect might be cited, if it were necessary.

That a promise by one party is sufficient consideration for a promise by the other is an established rule of contract law. A

was not disputed, and it was conceded that defendant violated the
terms of the contract, and the sole question for us is determining
if, and where a sufficient consideration for the contract,
The theory of defendant in the trial court was that since
there was no change in the wages, hours or working conditions of
defendant after he signed the contract, there was no consideration
for the contract and it was, therefore, unenforceable. Plaintiff
admits that there was no change in defendant's wages, hours or work-
ing conditions after the signing of the contract, but claims that
the contract was valid and enforceable because (1) "The mutual
promises made by and between the parties in the contract constitute
a sufficient consideration for each; and (2) The Plaintiff told the
defendant that it would discharge him immediately if he did not sign
this contract, and was threatened with dismissal, and in these
circumstances, is consideration for the contract, and he admits
amounts to a re-employment of the defendant."
In Evans v. Hamilton, 300 Ill. 181, there was involved the
question as to whether or not a contract not to testify in a particular
business was founded upon legal consideration, and (at pp. 187-8) the
court said: "In all such cases it is not the payment of a sum of
money whether the consideration is adequate or of great value to
that which the party takes by the restriction. In cases of this
character it is impossible for courts to tell how valuable to the
complainant or how injurious to the defendant may be the restriction
ought to be imposed. It is sufficient to uphold such contracts
if the court arrives at the conclusion that there is, as a matter of
fact, some legal consideration; but the adequacy of the consideration
is within the exclusive domain of the parties where they contract
freely and without fraud." (Italics ours.) A number of other Illinois
cases to the same effect might be cited, if it were necessary.
That a promise by one party is binding consideration for

forbearance to do something which the party had a legal right to do may constitute a valid consideration. (See 13 C. J. 324.) Prior to the execution of the contract plaintiff had the legal right to discharge defendant at any time without notice of any sort, and defendant had the right to quit plaintiff's employ at any time without any notice whatsoever. In clause seven of the contract plaintiff agreed that it must give defendant three days' notice of its intention to discharge, or, in the alternative, three days' extra wages, before it could discharge him; and defendant agreed that he must give plaintiff one week's notice before quitting his employment. Plaintiff contends that when defendant was presented with the option of immediate discharge or the execution of the contract, the forbearance from discharging defendant upon his signing the contract was a sufficient consideration for the contract, and, in effect, it amounted to a reemployment of defendant by plaintiff. We think this contention is a meritorious one. "A valuable consideration consists either of some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other. (1 Page on Contracts, (2d ed.) sec. 514; People v. Commercial Life Ins. Co., 247 Ill. 92; Buchanan v. International Bank, 78 id. 500.)" (Anderson v. Bills, 335 Ill. 524, 529-530.) "It is not essential that the consideration should import a certain gain or loss to either party. It is sufficient if the party in whose favor the contract is made * * * parts with a right which he might otherwise exert." (6 R. C. L. p. 658. Italics ours.) A valuable consideration, however small it may be, is sufficient. (See Orr v. Orr, 181 Ill. App. 148, 152, and cases cited therein.) Many other cases to the same effect might be cited if it were necessary.

We hold that the trial court erred in finding and decreeing that the contract was without consideration and therefore unenforceable, and in dismissing the bill for want of equity.

10-10-1944

The judgment order of the City Court of Chicago Heights is reversed, and the cause is remanded, with directions to enter a decree in accordance with the prayer of the complaint.

JUDGMENT ORDER REVERSED, AND CAUSE
REMANDED WITH DIRECTIONS.

Sullivan and Friend, JJ., concur.

The judgment entered by the District Court of the District of Columbia in the case of *United States v. [illegible]*, 500 F.2d 1000, 1001 (D.C. Cir. 1974), is reversed, and the case is remanded, with directions to enter a decree in accordance with the prayer of the complaint.

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

39867

MARY KLENNER,
Appellant,

v.

ASTNA LIFE INSURANCE
COMPANY, a corporation,
Appellee.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

299 U.A. 615²

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an action by plaintiff, Mary Klenner, to recover upon an insurance policy for \$2,000 on the life of her husband, wherein she was named beneficiary. The case was tried before the court and a jury and at the close of all the evidence defendant's motion that the jury be directed to bring in a verdict for \$74.24, representing the amount of the premium paid on the policy, was allowed. Judgment for plaintiff for \$74.24 was entered on such verdict and this appeal by plaintiff is brought to review said judgment.

Plaintiff's complaint stated a good **cause** of action.

Defendant's answer interposed the defense that plaintiff was not entitled to recover because the policy contained the provision that, "this policy shall not become effective until the first premium upon it is paid during the good health of the insured," and ^{that} the insured was not in good health when the first premium on his policy was paid in full. This affirmative defense raised the issue as to whether the insured was in good health when the first premium on the policy was paid the morning of December 12, 1934. This was the sole issue presented by the pleadings and tried in the lower court.

As to the material facts bearing upon this issue it was uncontroverted that the payment of the first premium on the policy

was provided that the payment of the first premium on the policy
as to the material facts bearing upon the issue it was
held in the lower court.

13, 1934. This was the sole issue presented by the pleadings and
the first premium on the policy was paid the morning of December
raised the issue as to whether the insured was in good health when
premium on his policy was paid in full. This affirmative defense
insured," and ^{that} the insured was not in good health when the first
first premium upon it is paid during the good health of the
provision that "this policy shall not become effective until the
was not entitled to recover because the policy contained the
Respondent's answer interposed the defense that plaintiff
plaintiff's complaint stated a good cause of action.

judgment.
verdict and this appeal by plaintiff is sought to reverse said
alleged. Judgment for plaintiff for \$4,000 was entered on main
representing the amount of the premium paid on the policy, was
motion that the jury be directed to bring in a verdict for \$4,000,
court and a jury and at the close of all the evidence defendant's
wherein she was named beneficiary. The case was tried before the
upon an insurance policy for \$2,000 on the life of her husband.
This is an action by plaintiff, Mary Klemmer, to recover
MR. JUSTICE. REPLY BY DEFENSE THE COURT ON THE COURT.

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was completed around 8 a.m. December 12, 1934; that such payment was made by plaintiff, the wife of insured and the beneficiary under the policy; that either during the evening of December 11, 1934, or on the morning of December 12, 1934, plaintiff telephoned an agent of defendant to come to her home for the premium; that plaintiff telephoned a physician on the morning of December 12, 1934, to attend her husband and that when the physician arrived at her home between 8 a.m. and 9 a.m. that morning he examined the insured, diagnosed his case, found that he was suffering from pneumonia and thereupon took him to the hospital; that the attending physician testified that the insured was suffering from pneumonia at 8 o'clock on the morning of December 12, 1934; and that he died at 6:15 a.m. December 13, 1934. Plaintiff offered no evidence and none appeared in the record to rebut the evidence submitted by defendant in support of its affirmative defense that the insured was not in good health when the first premium was paid on the policy December 12, 1934.

Plaintiff contends (1) "that there was sufficient evidence clearly tending to prove the essential elements of a cause of action;" (2) "that the question of the health of John Klenner, the insured, now deceased, was one of fact for the jury;" and (3) "that the trial court was in error in directing a verdict in favor of defendant."

The rule of law expressed in plaintiff's first contention is sound, but it has no application to the instant case because the only issue herein is based upon the affirmative defense pleaded by defendant that the insured was not in good health when the first premium was paid. An affirmative defense may constitute a complete bar to recovery, although the allegations of a complaint are admittedly true. In passing upon this question in Wallner v. Chicago Traction Co., 245 Ill. 148, the court held at p. 152:

"The party making the motion [for direction of verdict] may rely upon the failure of proof in any respect necessary to sustain a verdict. The question presented by such a motion is not

was completed around 8 a.m. December 12, 1934; this report

was made by plaintiff, the wife of insured and the beneficiary

under the policy; that again during the evening of December 12,

1934, or on the morning of December 13, 1934, plaintiff telephoned

an agent of defendant to come to her home for the following day;

plaintiff telephoned a physician on the morning of December 13, 1934,

to attend her husband and that when the physician arrived at her home

between 8 a.m. and 9 a.m. that morning he examined the deceased,

diagnosed his case, found that he was suffering from pneumonia and

thereupon took him to the hospital; that the attending physician

testified that the deceased was suffering from pneumonia at 8 o'clock

on the morning of December 13, 1934; and that he died at 6:15 a.m.

December 13, 1934. Plaintiff offered no evidence and none appeared

in the record to rebut the evidence furnished by defendant in support

of its affirmative defense and the burden was not in good faith

that the Court should rule in favor of plaintiff.

Plaintiff contends (1) that there was sufficient evidence

directly tending to prove the essential elements of a cause of action;

(2) that the question of the death of John Klemm, the insured,

now deceased, was one of fact for the jury; and (3) that the trial

court was in error in directing a verdict in favor of defendant.

The rule of law expressed in plaintiff's first contention

is sound, but it has no application to the instant case because the

only issue raised is based upon the affirmative defense pleaded by

defendant that the insured was not in good health when the first

premium was paid. An affirmative defense may constitute a complete

bar to recovery, although the allegations of a complaint are not

misleadingly true. In passing upon this question in Waller v. Waller

100 Cal. 222, 120 P. 1000, 120 P. 1001, 120 P. 1002.

*The party making the motion [for direction of verdict]

may rely upon the failure of proof in any respect necessary to sus-

tain a verdict. The question presented by such a motion is not

necessarily, as insisted upon by defendant in error, whether the evidence tends to support the allegations of the declaration, but is whether there is evidence legally tending to sustain a verdict against the party making the motion. (Wolf v. Chicago Sign Printing Co., 233 Ill. 501.) The question therefore depends upon the character of the issue. Where evidence of an affirmative defense is offered, as in this case, it is proper to direct a verdict for the defendant, even though all the averments of the declaration are proved, if the evidence of the affirmative defense is not contradicted or explained."

(To the same effect are Cohen v. New York Life Ins. Co., 256 Ill. App. 345; Kranicka v. Prudential Insurance Co., 235 Ill. App. 257; Enright v. Knights of Security, 253 Ill. 460; Blahofski v. Metropolitan Life Ins. Co., 237 Ill. App. 220.)

As to plaintiff's second contention that the question of the health of the insured was one of fact for the jury, it is sufficient to say that while it is true the evidence presented concerning the state of health of insured involved the determination of the ultimate fact as to whether said insured was in good or bad health when the first premium was paid on his policy, this does not mean that the question must be submitted to the jury if there is no conflict in the evidence to prove the fact to be one way or the other. That the insured in this cause was suffering from pneumonia at the time the first premium was paid was positively proved and was not disputed at the trial, nor is it questioned here. This being true there was no question of fact concerning the health of the insured for the jury to determine nor was there any evidence in the record which would fairly tend to support a verdict for plaintiff. "Because there was no conflict in the evidence on that subject it was not necessary that the trial court should submit that question to the jury." Buchanan v. Scottish Union, 210 Ill. App. 523. To the same effect is Woods v. Bowman, 207 Ill. App. 612. The apparent good health of insured prior to the date of the issuance of the policy, when the first premium thereon was paid, was entirely immaterial.

As to plaintiff's final contention that the trial court erred in directing the verdict for defendant, it is only necessary to point

...as indicated upon my testimony in cross, recross and
evidence tends to support the allegations of the defendant. But
whether there is evidence legally tending to establish a verdict
against the party making the motion. (Joint v. ...)
...the question whether evidence of the
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...as in this case, it is proper to direct a verdict for
the defendant, even though all the evidence of the defendant are
...if the evidence of the affirmative defense is not
...disputed or explained."

(To the same effect are Good v. New York Life Ins. Co., 300 Ill.
App. 3d, 358; Amundson v. Northwestern Insurance Co., 303 Ill. App. 3d, 357;
... v. ..., 303 Ill. App. 3d, 357;
... v. ..., 303 Ill. App. 3d, 357.)

As to Plaintiff's second contention that the question of the
health of the insured was not at issue for the jury, it is sufficient
to say that while it is true the evidence presented concerning the
state of health of insured involved the determination of the ultimate
fact as to whether said insured was in good or bad health when the
first premium was paid on his policy, this does not mean that the
question must be submitted to the jury if there is no conflict in
the evidence to prove the fact to be one way or the other. That the
insured in this cause was suffering from pneumonia at the time the
first premium was paid was positively proved and was not disputed at
the trial, nor is it questioned here. This being true there was no
question of fact concerning the health of the insured for the jury to
determine nor was there any evidence in the record which would fairly
lead to support a verdict for Plaintiff. Because there was no
conflict in the evidence on that subject it was not necessary that
the trial court should submit that question to the jury. Amundson
v. ..., 303 Ill. App. 3d, 357. To the same effect is Wood
v. ..., 303 Ill. App. 3d, 357. The apparent good health of insured
prior to the date of the issuance of the policy, when the first pre-
mium thereon was paid, was entirely immaterial.
As to Plaintiff's third contention that the trial court erred
in excluding the evidence of the defendant, it is sufficient to say

out that "the more reasonable rule, which has now come to be established by the better authority, is, that when the evidence given at the trial, with all inferences that the jury could justifiably draw from it, is so insufficient to support a verdict for the plaintiff, that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant." (Simmons v. Chicago & Tomah R. R. Co., 110 Ill. 340.)

Defining and clarifying the rule as to the circumstances under which a trial court is warranted in directing a verdict in Offcutt v. Columbian Exposition, 175 Ill. 472, the court held at pp. 475, 476:

"It is apparent that "evidence tending to prove" means more than a mere scintilla of evidence, but evidence upon which the jury could, without acting unreasonably in the eye of the law, decide in favor of the plaintiff or the party producing it. It is not intended by this practice that the function of the jury to pass upon questions of fact is to be invaded, any more than it is intended that such function is to be invaded by a motion to set aside a verdict and for a new trial upon the ground of the want of evidence to sustain the verdict. In neither case is the court authorized to weigh the evidence and decide where the preponderance is.' See, also, Widdall v. Jansen, 168 Ill. 43, and Rack v. Chicago City Railway Co., 173 id. 289. ***

"Much confusion has doubtless arisen from the different meanings attached to the phrase 'tending to prove,' but giving it the meaning as held by this court in the Bartelott case, above cited, - that it is 'evidence upon which the jury could, without acting unreasonably in the eye of the law, decide in favor of the plaintiff or the party producing it,' - most of the apparent conflict between the different cases disappears. Thus, it was said by Mr. Justice Maule in Jewell v. Parr, 13 Com. Bench, 909; 'Applying the maxim de minimis non curat lex, when we say that there is no evidence to go to the jury we do not mean that there is literally none, but that there is none which ought reasonably to satisfy the jury that the fact sought to be proved is established.' It is, of course, true that there are cases where there is literally no evidence in support of some material and necessary allegation, but there are many others where there may be some evidence tending in some remote degree to support every allegation, yet of too inconclusive and unsubstantial a character to be the foundation of a verdict. In either of such cases the court may, when the question is properly raised, so determine, and direct a verdict as in cases where there is no evidence. *** As well said in Connor v. Giles, 36 Me. 132, 'there is no practical or logical difference between no evidence and evidence without legal weight.' It is true that such motions are not to be regarded with favor. The province of the jury must not be invaded, (Fraser v. Howe, 106 Ill. 563,) and where reasonable minds, acting within the limitations prescribed by the rules of law, might reach different conclusions the evidence must be submitted to the jury."

one that "the more reasonable rule, which has now come to be est-
ablished by the better authority, is, that when the evidence given
at the trial, with all its weaknesses, does not fairly and reasonably
show from it, as no intelligent person would suppose a verdict for the
plaintiff, that such a verdict, if returned, must be set aside,
the court is not bound to grant the writ of the writ, but may direct
a verdict for the defendant." (Hickson v. Smith, 10 Mich. 44, 45.)

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Where, as here, the evidence presented in support of defendant's affidavit of defense is clear and convincing and there is no evidence fairly tending to prove that the insured was in good health when the first premium on the policy was paid, the trial court had no alternative but to direct the verdict for defendant.

For the reasons given herein the judgment of the Circuit court is affirmed.

JUDGMENT AFFIRMED.

Scanlan, P. J., and Friend, J., concur.

There, on the other hand, the evidence presented in support of
the defendant's alibi is that on the night of the murder,
there is no evidence tending to prove that the defendant
was in New York when the fatal shooting on the night was being
the trial court had no alternative but to direct the verdict for
the defendant.
For the reasons given above the judgment of the circuit
court is affirmed.

WILLIAM J. BROWN, Jr., Circuit Judge.

40403

H. F. BOSTEN,

Appellee,

v.

WESTERN UNITED GAS AND ELECTRIC
COMPANY, a corporation,
Appellant.

28 A
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

299 T.A. 615³

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This appeal seeks to reverse a judgment for \$500 entered in favor of plaintiff, H. F. Bosten, in an action tried by the court without a jury, which was brought by Bosten for damages for injuries to his person and automobile, alleged to have been sustained by him by reason of defendant's negligence in the operation of its motor truck. The judgment appealed from also contained a finding that plaintiff was not liable for the damage to defendant's truck, set forth in the latter's counterclaim, which damage it was stipulated upon the trial amounted to \$140. No question is raised on the pleadings.

This action arose out of a collision between an automobile owned and driven by plaintiff and a motor truck owned by defendant at the intersection of Ogden avenue and Main street in Downers Grove, DuPage county, Illinois. Ogden avenue is a four-lane highway running in an easterly and westerly direction and is forty feet wide. Main street is a paved highway, thirty feet wide, extending in a northerly and southerly direction. The two highways intersect at right angles and there were "stop and go" traffic signals on all four corners of the intersection, which showed red and green signal lights alternately. Plaintiff's automobile was traveling in an easterly direction on Ogden avenue and defendant's Ford truck was traveling in a northerly direction on Main street. They both continued to so proceed

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W. F. HORTON

Applicant

JOHN J. HORTON

JOHN J. HORTON

WESTERN UNION AND THE
GEMINITY, a corporation,
Appellant.

214 A 1000

THE UNITED STATES OF AMERICA

This appeal arises from a judgment for \$500 entered

in favor of plaintiff, W. F. Horton, in an action begun by him

against defendant, Western Union and the Geminity, a corporation,

injured to his person and automobile, alleged to have been damaged

by him by reason of defendant's negligence in the operation

of its motor truck. The judgment entered there also contained a

finding that plaintiff was not liable for the damage to defendant's

truck, set forth in the latter's counterclaim, which damage it was

alleged to have suffered by reason of plaintiff's negligence in turning

on the headlights.

This action arose out of a collision between an automobile

owned and driven by plaintiff and a motor truck owned by defendant

at the intersection of Fifth Avenue and Main Street in Kansas City,

large county, Illinois. Fifth Avenue is a four-lane highway running

in an easterly and westerly direction and is forty feet wide. Main

Street is a paved highway, thirty feet wide, extending in a northerly

and southerly direction. The two highways intersect at right angles

and there were "stop and go" traffic signals on all four corners of

the intersection, which showed red and green signals alike after

midnight. Plaintiff's automobile was traveling in an easterly direc-

tion on Fifth Avenue and defendant's Ford truck was traveling in a

westerly direction on Main Street. They both continued to proceed

until they collided within the intersection of said streets. This occurrence took place at about 4 p.m. July 1, 1937, which was a clear day.

The only question presented for our determination is whether the findings of the trial court upon which the judgment was based were against the manifest weight of the evidence.

The controlling issue of fact presented to the jury was the signal exhibited by the traffic light just prior to and at the time the respective motor vehicles entered the intersection. Both plaintiff and defendant assert that the traffic control signals in operation displayed a green or "go" signal in his favor as his vehicle approached and entered said intersection.

Riding in plaintiff's car with him were his wife, Della Bosten, who sat to his right on the front seat, and her sister, Blanche Thompson, who sat in the center of the rear seat. Plaintiff's wife and sister-in-law were interested witnesses, not only because of their relationship to plaintiff but because they both had a suit pending against defendant for injuries received in the collision involved here. Plaintiff, his wife and sister-in-law were the only witnesses who testified that he had the green light, giving him the right of way as he approached Main street and entered the intersection from the west on Ogden avenue.

As opposed to their testimony, Charles P. Johnston, the driver of defendant's truck, Kenneth Olson, an employee of defendant not on duty at the time, who was riding on the seat of the truck alongside of Johnston, Frank Long, a pedestrian walking south on Main street on the south side of Ogden avenue, and Frank Metch and Alfred Bolte, who testified that as they approached Ogden avenue from the north on Main street they had the red light against them and they stopped their automobile and motor truck, respectively, north of the north sidewalk line of Ogden avenue. These five witnesses testified in defendant's behalf that as his truck approached Ogden avenue and entered the inter-

until they collided within the intersection of said streets. With
occurrences took place at about 8 p.m. July 1, 1934, which was a
clear day.

The only question presented for our determination is whether
the findings of the trial court upon which the judgment was based were
against the manifest weight of the evidence.

The controlling issue in this case is whether the jury was the
evidence submitted by the parties. The trial court found that the
the respective motor vehicles operated the intersection. The evidence
and defendant's account that the traffic signals in operation
displayed a green or "go" signal in his favor as his vehicle approached
and entered said intersection.

Nothing in plaintiff's case with him was the wife, Maria
Houston, who sat in his right on the front seat, and her sister,
Virginia Campbell, who sat in the rear of the car seat. Plaintiff's
wife and sister-in-law were passengers, not only because of
their relationship to plaintiff but because they were not bona-
fide parties to the litigation involved in this litigation. In fact,
plaintiff, his wife and sister-in-law were the only witnesses
who testified that he had the green light. Having this the right of
way, he approached Main street and entered the intersection. The
he went on Ogden Avenue.

It appears to this court that, under the facts
of defendant's case, which clearly are undisputed, and upon the
evidence at the time, who was riding on the back of the truck along with
of Johnston, Frank Jones, a pedestrian walking south on Main street,
on the south side of Ogden Avenue, and Frank Smith and Alvin Miller,
who testified that as they approached Ogden Avenue from the north on
Main street they had the red light against them and they stopped their
automobile and motor truck, respectively, north of the north sidewalk
line of Ogden Avenue. These facts are undisputed in this case.

section, it had the green or "go" light in its favor, giving it the right of way. Johnston was an interested witness since, in addition to being the driver of defendant's truck, he was made a joint defendant in the pending action heretofore referred to brought by plaintiff's wife and sister-in-law. Olson's only interest was as an employee of defendant. There is nothing in the record to show that Long, Stech or Bolte were other than disinterested witnesses.

It is true that an effort was made to discredit and impeach the testimony of the three witnesses last mentioned. No witness testified directly that Long was not where he said he was at and just prior to the collision. The only effect of the testimony of any witness concerning Long's presence at the scene of the collision was that he was not noticed there. Long's presence is corroborated in that he told the police officer who arrived at the scene shortly after the collision that he saw what occurred and gave the officer his name as a witness.

As heretofore stated Stech and Bolte both testified that as they were driving south on Main street and approached Ogden avenue from the north the red light was against them and they stopped north of the north sidewalk line of Ogden avenue. They further testified that while they were so stopped, waiting for the light to change to green to permit them to proceed south across Ogden avenue, they saw plaintiff's car approach Main street from the west on Ogden avenue and defendant's truck approach Ogden avenue on Main street from the south; that while plaintiff's car was some distance west of Main street and defendant's truck was some distance south of Ogden avenue the traffic light changed to green or "go" for the north and south traffic; and that after the collision Stech parked his automobile on the west side of Main street, north of Ogden avenue, and Bolte's truck was parked behind the car belonging to Stech.

Plaintiff sought to show that neither Stech nor Bolte had stopped their vehicles on Main street north of Ogden avenue, prior to

section, it had the green on "Go" light in the tower, giving it the right of way. Johnson was an interested witness since, in addition to being the driver of defendant's truck, he was made a joint defendant in the pending action. Johnson testified to being at the scene of the collision. He testified that he saw the truck of defendant's wife and that he saw the truck of defendant's wife and that he saw the truck of defendant's wife. There is nothing in the record to show that an employee of defendant. There is nothing in the record to show that any other witnesses were called by defendant.

It is true that an effort was made to identify and locate the testimony of the three witnesses last mentioned. As witness testified directly that Lang was not there he was at and that prior to the collision. The only effect of the testimony of any witness was concerning Lang's presence at the scene of the collision and that he was not located there. Lang's presence is corroborated in that he was at the scene of the collision and that he was at the scene of the collision. The only effect of the testimony of any witness was concerning Lang's presence at the scene of the collision and that he was not located there. Lang's presence is corroborated in that he was at the scene of the collision and that he was at the scene of the collision.

As heretofore stated, each and every witness testified that as they were driving south on Main street and approaching Ogden Avenue from the north the red light was against them and they stopped north of the north sidewalk line of Ogden Avenue. They further testified that while they were so stopped, waiting for the light to change to green to permit them to proceed south across Ogden Avenue, they saw defendant's truck approach Main street from the west on Ogden Avenue and that while defendant's car was distant west of Main street and defendant's truck was some distance south of Ogden Avenue the traffic light changed to green on "Go" for the north and south traffic and that after the collision which occurred at the intersection of the west side of Main street, north of Ogden Avenue, and Johnson's truck was found behind the car belonging to Johnson.

Defendant sought to show that neither Beech nor Holte had changed their positions as they stood with at Ogden Avenue, prior to

the collision as they testified they did, and that they were not at the scene of the accident at all. The only witness for plaintiff who testified directly that Stech and Bolte were not where they said they were immediately prior and at the time of the collision was plaintiff's wife, who said that shortly before her husband drove into the intersection she looked toward the west side of Main street north of Ogden avenue and saw no automobiles or trucks there. The testimony of the other witnesses who testified in this regard was merely to the effect that they did not notice whether Stech and Bolte were driving south on Main street and had their vehicles at the positions stated by them.

Plaintiff also sought to show by the testimony of one Glenn Wolf that Stech and Bolte were not at or near the intersection to witness the accident. According to Wolf he did not reach the scene until after the collision had occurred. He testified that upon his arrival he parked his automobile on the north side of Ogden avenue west of Main street and that at that time there were no automobiles or trucks parked on the west side of Main street north of Ogden avenue, either north or south of the traffic light at the northwest corner of the intersection. Wolf's testimony is silent as to whether or not the persons injured in the collision had been removed before his arrival, and since both Stech and Bolte testified that they remained on the scene only a few minutes until the injured persons had been removed and that they then had driven away, Wolf's testimony that there were no automobiles or trucks in the vicinity of the northwest corner of the intersection is entirely valueless and ineffective in so far as it was intended to discredit or impeach the testimony of Stech and Bolte.

Thus on the controlling issue of fact in the case three interested witnesses testified in plaintiff's behalf, including himself, while on the other hand in addition to defendant's driver and his other employee, Olson, who rode with the driver, three

The collision on May 1951 occurred at 11:00 p.m. at the corner of the accident at 11:00 p.m. The only witness for Plaintiff's wife, who said that shortly before her husband drove into the intersection she looked across the west side of Main Street north of Ogden Avenue and saw no automobile at Ogden Street. The testimony of the other witnesses who testified in this regard was merely to the effect that they did not recall whether Jack and Edith were driving south or Main Street and had their vehicles at the positions stated by them.

Plaintiff also sought to show by the testimony of one Edith that Jack and Edith were not at home on the intersection at the time of the accident. According to Edith he did not leave the home until after the collision had occurred. He testified that when he arrived he parked his automobile on the east side of Ogden Avenue west of Main Street and that at that time there were no automobiles or trucks parked on the west side of Main Street north of Ogden Avenue, either north or south of the traffic light at the northwest corner of the intersection. Edith's testimony is silent as to whether or not the persons injured in the collision had been removed before his arrival, and since both Jack and Edith testified that they remained on the scene only a few minutes until the injured persons had been removed and that they then had driven away, Edith's testimony that there were no automobiles or trucks in the vicinity of the northwest corner of the intersection is entirely unimpaired and is effective in so far as it was intended to establish on Plaintiff's testimony of Jack and Edith.

Thus on the controlling issue of fact in the case three interested witnesses testified in Plaintiff's behalf, including himself, while on the other hand in addition to defendant's driver and his other witnesses, Edith, who rode with the driver, three

witnesses who were disinterested in so far as the record discloses testified in defendant's behalf.

Inasmuch as this case will in all likelihood be retried, we refrain from further discussion of the evidence.

We are familiar with the rule that the finding of the court is entitled to the same weight as a verdict of a jury and the further rule that it is the peculiar province of the court or jury trying the facts to pass upon the credibility of the witnesses and the weight to be given their testimony. We are familiar also with the general rule that where there is a conflict in the evidence, since the court or jury trying the facts has the advantage of the opportunity of seeing and hearing the witnesses and of judging of the weight to be given their testimony by their actions and demeanor while testifying, the finding of a court or the verdict of a jury should not be disturbed unless same is manifestly against the weight of the evidence.

However, after a careful examination of all the evidence in the record, having in mind all the elements that the court should have considered in passing upon the credibility of the witnesses and the weight that should have been accorded their testimony in arriving at its finding in this cause, we are impelled to hold that the finding of the trial court was manifestly against the weight of the evidence and that the ends of justice will be best served by a retrial of this cause. It is not our intention to hold or intimate that if upon another trial of this cause a finding or verdict is reached in favor of plaintiff upon the same or practically the same evidence as is contained in the record on this appeal, a judgment entered on such finding or verdict will be reversed by this court.

For the reasons given the judgment of the Municipal court is reversed and the cause is remanded.

JUDGMENT REVERSED AND CAUSE REMANDED.

Scanlan, P. J., and Friend, J., concur.

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...is entitled to the same weight as a verdict of a jury and the finding ...

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...However, after a verdict is reached on all the evidence in ...

...the court, having in mind all the evidence and the weight ...

...have considered in passing upon the credibility of the witness and ...

...the weight that should have been assessed their testimony in arriving ...

...of the finding in this case, we are impelled to hold that the finding ...

...of the trial court was manifestly against the weight of the evidence ...

...and that the ends of justice will be best served by a reversal of this ...

...case. It is not our intention to hold or intimate that upon ...

...another trial of this case a finding as varied as was reached in this ...

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...ained in the record on this appeal, a judgment entered on such finding ...

...as verdict will be reversed by this court.

...the court in the finding of the municipal court is ...

...and other ...

...and ...

40216

CHICAGO TITLE & TRUST COMPANY,
as trustee by succession, etc.,
Appellee,

v.

ABRAHAM J. BISENBERG et al.,
Appellees.

PHILIP A. PAULSON et al.,
(Interveners),
Appellees.

On appeal of MAYER KARASIK,
(Intervener),
Appellant.

MAYER KARASIK,
Appellant,

v.

PHILIP A. PAULSON et al.,
Appellees.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

299 I.A. 616¹

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Mayer Karasik appeals from two decrees entered in the Circuit court involving the foreclosure and reorganization of a bond issue underwritten by the Madison & Kedzie State Bank. In cause No. 40216 (hereinafter referred to as the Bisenberg case) Chicago Title & Trust Company, as successor trustee, filed a complaint of foreclosure, wherein the bondholders' protective committee and Karasik became parties by intervention. In case No. 40217 (hereinafter referred to as the Karasik case) Karasik filed a complaint, seeking to restrain the committee and its nominee from using his bonds in payment of any part of the bid at the foreclosure sale held in the Bisenberg case; also praying that the agree-

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* Ltr to S. Williams & T. Martin
reaffirming

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Mayer Katsalk appears from two depositions entered in the
 Circuit court involving the foreclosure and redemption of a
 bond issue underwritten by the Madison & Indiana State Bank. In
 case No. 40812 (hereinafter referred to as the Wisconsin case)
 Chicago Title & Trust Company, as successor trustee, filed a
 complaint of foreclosure, against the bondholders, protective
 committee and Katsalk became parties by intervention. In case
 No. 40814 (hereinafter referred to as the Kansas case) Katsalk
 filed a complaint, against the trustee and committee and the
 bondholders. His bonds in payment of any part of the bid at the
 sale was held in the Wisconsin case; also showing that the
 same bonds were held in the Kansas case.

ment, under which Karasik had deposited his bonds, be declared void and not binding on him, and that he be permitted to rescind the same because of certain breaches of trust set forth in his complaint; that his bonds be returned to him and that the depository be required to accept his written dissent from the plan of reorganization; that no fees be allowed to the reorganizers; that a receiver be appointed; that the court remove the committee, and also praying for general relief.

The bond issue involved originally aggregated \$210,000, but by prepayments was reduced to \$192,000. Madison & Kedzie State Bank was designated as the original trustee, but in February, 1930, that bank transferred its assets to a newly organized bank, known as the Madison - Kedzie Trust & Savings Bank. In November, 1931, the latter was placed in the hands of a receiver by the Auditor of Public Accounts. In April, 1930, a bondholders' committee was organized for the protection of the holders of bonds sold by the Madison & Kedzie State Bank, which originally consisted of Abel Davis, Chairman of the board of directors of Chicago Title & Trust Company, Chester Cook, an independent real estate operator, Stuart Otis, an officer of the City National Bank & Trust Company, Hiram Cody, formerly connected with the Cody Trust Company, and E. G. Swanson. Shortly after the committee was formed Swanson and Cody resigned, and Abel Davis, who had assumed the chairmanship of the committee, died. Mr. Davis's place was taken by Philip A. Paulson, an assistant trust officer of the Chicago Title & Trust Company, and at the time of the proposed reorganization the committee consisted of Paulson, Cook and Otis. Under a deposit agreement prepared when the committee was organized, Chicago Title & Trust Company, was named as depository. It provided, among other things, that any bondholder who deposited his bond pursuant to the agreement should be considered as a party thereto, with the same effect as if he had signed it, and that each depositing

...which it was desired to have, be declared
void and not binding on him, and that he be permitted to receive
the same because of certain branches of trust set forth in the
complaint; that his bonds be returned to him and that the depositary
be required to accept his written dissent from the plan of reorganiza-
tion; that he be allowed to the reorganization; that a receiver
be appointed; that the same remove the committee, and also paying
for interest thereon.

The said plan was approved by the court, and
by proponent was reduced to \$100,000. Madison & Kelsie State Bank
was designated as the original trustee, but in February, 1930, that
bank transferred its assets to a newly organized bank, known as the
Madison - Kelsie Trust & Savings Bank. In November, 1931, the latter
was placed in the hands of a receiver by the action of the Illinois
courts. In April, 1932, a corporation committee was organized for
the protection of the holders of bonds held by the Madison & Kelsie

State Bank, which originally consisted of Abel Davis, Chairman of
the board of directors of Chicago Title & Trust Company, Chester Cook,
an independent real estate operator, Stuart Cline, an officer of the
City National Bank & Trust Company, William Cook, formerly connected
with the Cook Trust Company, and W. D. Swanson. Shortly after the
committee was formed Swanson and Cook resigned, and Abel Davis, who
had assumed the chairmanship of the committee, died. Mr. Davis's
place was taken by Philip H. Swanson, an assistant trust officer of
the Chicago Title & Trust Company, and at the time of the proposed
reorganization the committee consisted of Swanson, Cook and Cline.
Under a deposit agreement prepared when the committee was organized,
Chicago Title & Trust Company, was named as depositary. It provided,
among other things, that the committee be organized as a party thereto, with
the same effect as if it had signed it, and that each depositing

bondholder should be given a certificate of deposit, which recited that the bondholder had deposited his bonds pursuant to the terms of the protective agreement and that he would be bound by all of its terms and conditions. The agreement provided that the committee should have power to adopt a plan of reorganization, to be binding upon the depositing bondholders, and that it might submit a plan to them for their approval or rejection; that when a plan was submitted, the bondholder should have twenty days within which to register his dissent and withdraw his bonds, upon paying to the committee his proportionate share of the fees and expenses incurred. The agreement also provided that the depositor should furnish in writing to the depository his address to which all communications should be sent; it gave to the committee power to employ counsel, and to fix their compensation.

The bill to foreclose the trust deed in the Rosenberg cause was filed April 10, 1931. The bonds had previously been called for deposit, and from the outstanding issue of \$192,000 there were deposited with the depository under the agreement bonds in the principal amount of \$185,700.

There appears to be some doubt as to whether Karasik was an original depositor. However, a certificate of deposit was issued to him September 22, 1931, showing the deposit of \$34,000 in bonds, and stating that it was a transfer from a prior certificate issued to the Pharmacy Paper Box Company. That certificate also contains a statement that the depositor is bound by the terms of amendments to the agreement adopted in January, 1931, and it was apparently delivered to Karasik personally, because the certificate itself was offered in evidence by his counsel upon hearing. In that certificate Karasik's address is given "In care of Madison & Redzie Savings Bank," and evidence was adduced showing that Karasik furnished this address to the party in charge of the depository records, and that no instructions for

a change of address had been received or recorded.

After the decree of foreclosure had been entered in the Eisenberg case, a plan of reorganization was formulated by the committee. The decree provided in considerable detail that if a bid at the sale was made pursuant to any plan, the master should be so advised; that a copy of the plan should thereupon be furnished to the master and returned by him together with his report of sale; that the names and addresses of the nondepositing bondholders be left with the master, who was to serve them with notice of the contents of the plan, as well as the date of the sale, and invite them to join in the plan, and it was provided that in connection with the motion to approve any sale, the plan should be submitted to the court. The decree also provided that due notice be given to all bondholders, and the court reserved jurisdiction therein to pass on the fairness and equity of any plan submitted, together with the fees and expenses incurred, in connection with the motion to approve the sale.

When the plan for reorganization was initiated, the equity of redemption was vested in the West Side Trust & Savings Bank, as trustee, for the benefit of Abraham J. Eisenberg, Be Smith and Ida Simon. In order to protect the redemption rights, the committee acquired the equity of redemption, without the payment of cash, by providing that the owners of the equity of redemption be given a 7-1/2% participation in the corporation to be organized and a lease of the property, expiring January 31, 1940, at a rental of \$550 per month for a part of the term and \$600 per month for the balance, with a percentage clause. The trial court had previously, in December, 1933, determined that a fair rental value of the property was \$375 per month, and had directed the receiver to make a lease to Eisenberg and Smith for that amount. Two years later the matter again came before the court, and the net rental was raised to \$450 per month. When the agreement with the owners was negotiated in 1936, real estate values had

... change of address had been received on record.

After the Bureau of Investigation had been advised in the
... case, a plan of investigation was formulated by the
... The Bureau provided an investigation report dated 1-1-34
... as the case was being prepared to go to trial, the matter should be
... (attached) that a copy of the plan should be furnished to the
... member and returned by him together with his report of said plan;
... the names and addresses of the participating businessmen be left with
... the member, who was to serve them with copies of the contents of the
... plan, as well as the date of the sale, and advise them to join in the
... plan, and it was provided that in connection with the matter to
... approve only said plan should be submitted to the court. The
... notes also provided that the notes be given to all businessmen,
... and the court reserved jurisdiction therein to pass on the return
... and copy of the plan (attached) together with the plan and notes
... furnished, in connection with the matter to approve the sale.
... when the plan for reorganization was initiated, the equity
... of reorganization was voted in the court which stated that the
... process, for the benefit of William L. Hixson, the debtor and the
... plan. In order to protect the reorganization rights, the committee
... required the equity of reorganization, without the payment of cash, by
... providing that the owners on the equity of reorganization be given a 7-1/2%
... participation in the corporation to be organized and a loan of the
... property, expiring January 31, 1935, at a rental of \$250 per month for
... a part of the term and \$500 per month for the balance, which was
... cents clause. The trial court had previously, in December, 1933,
... determined that a fair rental value of the property was \$250 per month,
... and had directed the receiver to make a loan to Hixson and family
... for that amount. Two years later the matter again came before the
... court, and the net rental was raised to \$400 per month. From the agree-

ment with the court was discontinued in 1935, and the value

a change of address had been received or recorded.

After the decree of foreclosure had been entered in the Eisenberg case, a plan of reorganization was formulated by the committee. The decree provided in considerable detail that if a bid at the sale was made pursuant to any plan, the master should be so advised; that a copy of the plan should thereupon be furnished to the master and returned by him together with his report of sale; that the names and addresses of the nondepositing bondholders be left with the master, who was to serve them with notice of the contents of the plan, as well as the date of the sale, and invite them to join in the plan, and it was provided that in connection with the motion to approve any sale, the plan should be submitted to the court. The decree also provided that due notice be given to all bondholders, and the court reserved jurisdiction therein to pass on the fairness and equity of any plan submitted, together with the fees and expenses incurred, in connection with the motion to approve the sale.

When the plan for reorganization was initiated, the equity of redemption was vested in the West Side Trust & Savings Bank, as trustee, for the benefit of Abraham J. Eisenberg, Abe Smith and Ida Simon. In order to protect the redemption rights, the committee acquired the equity of redemption, without the payment of cash, by providing that the owners of the equity of redemption be given a 7-1/2% participation in the corporation to be organized and a lease of the property, expiring January 31, 1940, at a rental of \$550 per month for a part of the term and \$600 per month for the balance, with a percentage clause. The trial court had previously, in December, 1933, determined that a fair rental value of the property was \$375 per month, and had directed the receiver to make a lease to Eisenberg and Smith for that amount. Two years later the matter again came before the court, and the net rental was raised to \$450 per month. When the agreement with the owners was negotiated in 1936, real estate values had

a change of address had been received or recorded.

After the decree of dissolution had been entered in the

minutes, a plan of reorganization was formulated by the committee. The decree provided in considerable detail that it was

at the time was made pursuant to any plan, the matter should be so advised; that a copy of the plan should thereupon be submitted to the

master and returned by him together with his report of sale; that the names and addresses of the nonresiding shareholders be left with

the master, who was to serve them with notice of the contents of the plan, as well as the date of the sale, and invite them to join in the

plan, and it was provided that in connection with the motion to

approve any sale, the plan should be submitted to the court. The

decree also provided that due notice be given to all bondholders,

and the court reserved jurisdiction therein to pass on the fitness

and equity of any plan submitted, together with the fees and expenses

incurred, in connection with the motion to approve the sale.

When the plan for reorganization was initiated, the equity

of redemption was vested in the West Side Trust & Savings Bank, as

trustee, for the benefit of Abraham J. Eisenberg, the Smith and Ida

Simon. In order to protect the redemption rights, the committee

acquired the equity of redemption, without the payment of cash, by

providing that the owners of the equity of redemption be given a 7-1/2%

participation in the corporation to be organized and a lease of the

property, expiring January 31, 1940, at a rental of \$650 per month for

a part of the term and \$600 per month for the balance, with a per-

centage clause. The trial court had previously, in December, 1935,

determined that a fair rental value of the property was \$375 per month,

and had directed the receiver to make a lease to Eisenberg and Smith

for that amount. Two years later the matter again came before the

court, and the net rental was raised to \$480 per month. When the agree-

ment with the owners was negotiated in 1936, real estate values had

become enhanced, and the net rental was fixed, as heretofore stated, at \$550 per month for a part of the term and \$600 per month for the balance, with a percentage on the gross rental over a certain amount.

After the equity of redemption was acquired and a lease made with Eisenberg and Smith, the committee adopted a plan of reorganization which provided in substance that an Illinois corporation should be organized to take title to the property for the benefit of the bondholders; that the capital stock of the corporation should be divided among the depositing bondholders, with the exception of 7-1/2% of the stock which was to go to the owners of the equity in payment of their redemption rights, transferred to the committee's nominee. The plan contained detailed information as to the bond issue and the property covered by the trust deed, the receipts and disbursements of the receiver since the inception of the receivership, the amounts and defaults in the payment of taxes, the terms of the agreement with the owners of the equity, the proposal for reorganization of the corporation, and the fees requested by the committee, its counsel, the costs of foreclosure, the cash advanced to the committee for the benefit of the bondholders, the estimated cost of reorganization, and for carrying the proposed plan into effect. This plan was mailed to all bondholders January 29, 1937, and no dissents were received by the committee during the period of twenty days allowed for that purpose. It was therefore concluded by the committee that the plan was acceptable to the holders of principal bonds aggregating \$185,700 then on deposit, and arrangements were accordingly made for holding the master's sale March 11, 1937. The only bid made, as shown by the master's report, was that of the nominee of the committee, for \$30,000. This did not take into account the unpaid taxes on the property, which, up to 1935 and exclusive of interest and penalties, amounted to \$14,694.84. To this item there would have to be added the 1936 general taxes, amounting to \$3,300, and

about one-fourth of the 1937 general taxes. Thus, exclusive of penalties, the unpaid taxes at the date of sale were approximately \$19,000, which together with penalties would bring the aggregate amount to \$25,000. This sum, added to the bid of the committee's nominee, would be equivalent to \$55,000. When the bid was made the net income from the property, without deduction of taxes, was \$6,600 a year, and after making allowance for taxes of \$3,200, the net income would be approximately \$3,400 a year. Applying the test of value approved by the Supreme court in Bryn Mawr Beach Bldg. Corp. v. First National Bank, 365 Ill. 409, and capitalizing the income at 8%, the fair valuation of the property would amount to \$42,500, and this was substantially less than the selling price after taking into consideration the unpaid taxes.

The evidence discloses that along with the notification to other bondholders, a copy of the plan was sent to Karasik, C/O Madison & Kedzie Savings Bank, on January 29, 1937. The envelope bore the return address of the committee, and was never returned. It is therefore fair to assume that Karasik received this notification, sent to the address which he had left with the depository. Karasik did not testify at the hearing, and the presumption that he received notice and a copy of the plan is not in anywise rebutted. After the expiration of twenty days, however, Karasik's attorney appeared at the office of Chicago Title & Trust Company and demanded the return of Karasik's bonds, and he delivered a written demand which referred to a tender of \$1,700, under protest. This demand was refused, on the ground that the committee had already determined that the period within which dissents were allowed had expired, and had caused its nominee to bid at the master's sale. After the sale, the committee's plan of reorganization was presented to the court, together with the master's report of sale, and a date was fixed and provisions made for due notice to all parties who wished to present their objections to the confirmation of the sale and plan. Karasik

about one-fourth of the first general income. Thus, exclusive of penalties, the unpaid taxes at the date of sale were approximately \$12,000, which together with penalties would bring the aggregate amount to \$22,000. This sum, added to the bid of the committee's nominee, would be equivalent to \$22,000. Then the bid was made the net income from the property, without deduction of taxes, was \$5,000 a year, and after making allowance for taxes of \$2,500, the net income would be approximately \$2,500 a year. Applying the cost of value approved by the Supreme Court in Wright v. Board of Education, 303 U.S. 402, and applying the income at 8%, the fair valuation of the property would amount to \$31,250, and this was substantially less than the selling price then being paid for the property.

The evidence disclosed that along with the notification to other bondholders, a copy of the plan was sent to Karsalk, 5/10 Madison & Kralie Savings Bank, on January 22, 1937. The envelope bore the return address of the committee, and was never returned. It is therefore fair to assume that Karsalk received this notification sent to the address which he had left with the depositary. Karsalk did not testify at the hearing, and the presumption that he received notice and a copy of the plan is not in any way rebutted. After the expiration of twenty days, however, Karsalk's attorney appeared at the office of Chicago Title & Trust Company and demanded the return of Karsalk's bonds, and he delivered a written demand which referred to a tender of \$1,700, which protest. This demand was refused, on the ground that the committee had already determined that the period within which demands were allowed had expired, and had caused the nominee to bid at the master's sale. After the sale, the committee's plan of reorganization was presented to the court, together with the master's report of sale, and a date was fixed and provisions were for the notice to all parties who wished to present their objections to the confirmation of the sale and plan. Karsalk

objected to the confirmation, and the approval of the sale and plan of organization over his objection constitutes the subject matter of the appeal in consolidated case No. 40218, known as the Eisenberg case.

Karasik's brief sets forth thirty separate errors and several different points and legal propositions as ground for reversal. Among these, the principal contention is that the power of a court of equity in foreclosure cases to pass upon the fairness of the plan of reorganization in connection with the confirmation of the bid at the sale is subject to the limitations that (1) the chancellor must require the presentation by the proponents of the plan of adequate and authentic information enabling the exercise of an informed judicial discretion; and (2) that the subordinate rights of the holders of junior interests may not be preserved by the operation of the plan at the expense of the holders of senior equities. Under the first proposition, it is argued that information was withheld from the court which would have enabled it to pass upon the fairness of the plan. This contention is untenable, because the plan presented contained a full description of the land, improvements, the bond issue, defaults by the mortgagor, delinquent taxes, a complete history of the foreclosure proceeding, a report of the operations of the receiver, together with a complete statement of the plan of reorganization and the activities of the committee, as well as a statement of fees and expenses requested and a detailed statement of the services rendered. In addition to this, the court had before it all necessary information concerning the value of the property for the purpose of determining the adequacy and fairness of the bid at the master's sale. In objecting to the confirmation of the sale and plan, Karasik specifically objected to giving Eisenberg and his associates, as owners of the equity of redemption, shares of stock representing an undivided 7-1/3% interest in the reorganized company. A similar provision was approved in Bryn Mawr Beach Bldg.

objected to the continuation of the contract of the said company
of examination over his objection contained the subject matter of
the appeal in consolidated case No. 40913, from the Honorable
Judge.
Karnal's brief case forth withly requires review and a final
different before and final disposition as regards the appeal. Now
there, the principal contention is that the power of a court of equity
in enforcement cases to pass upon the terms of the plan of re-
construction in connection with the continuation of the bid of the said
is subject to the limitation that (1) the shareholder must not be
prejudiced by the proposed plan of reconstruction and (2) the
information enabling the exercise of an informed judgment
and (3) that the shareholders' rights of the holders of junior interests
may not be protected by the operation of the plan as the exercise of
the holders of senior interests. Under the first proposition, it is
stated that information was obtained from the plan which would have
enabled it to pass upon the terms of the plan. This contention
is unavailing, because the plan presented a full description
of the land, improvements, the land issue, defined by the mortgage;
delinquent taxes, a complete history of the foreclosure proceedings,
a report of the operations of the receiver, together with a complete
statement of the plan of reconstruction and the activities of the
committee, as well as a statement of loss and expenses requested and
a detailed statement of the services rendered. In addition to this,
the court had before it all necessary information concerning the value
of the property for the purpose of determining the adequacy and fair-
ness of the bid of the mortgagee's sale. In objecting to the continuation
of the sale and plan, Karnal's specifically objected to having Kinsbury
and his associates, as owners of the property of reconstruction, share of
stock representing an undivided 7-1/2% interest in the reconstructed
company. The court's position was expressed in the following words:

Corp. v. First National Bank, 365 Ill. 409. It is common practice, approved by the courts, to acquire the equity of redemptions in reorganizations of this kind. Without these redemption rights, the committee could not have proceeded with the plan; the property could not be turned over to the bondholders, and the court proceedings must necessarily extend for fifteen months more, with a possibility that there might have been some redemption, by the senior or some subordinate interest, to the detriment of the bondholders. Therefore, agreements by committees to acquire redemption rights, and thereby facilitate the immediate operation of a plan for reorganization, have been generally upheld.

Karasik further objected to the plan because Eisenberg and his associates were given a net lease upon the premises upon terms hereinbefore set forth. The court had before it appraisals made on the property and its fair income value. In 1933 the fair rental was fixed at \$350 per month. This was later raised to \$450, and by the decree of which Karasik complains the rental was fixed at \$550 for part of the term and \$600 for the balance. There is abundant evidence to support the rental values thus determined by the court, and since Karasik produced no evidence whatever bearing on the value of the lease, we are not disposed to disturb the decree on that ground.

The contention that the plan proposed by the committee preserved the rights of the holders of junior interests at the expense of senior interests, is likewise untenable. It has been consistently held that the court has power to approve a plan which provides for participation by junior interests on a parity with senior interests. In the Bryn Mawr Beach Building Corp. v. First National Bank, *supra*, the committee purchased the equity from the mortgagor for \$10,000 in cash, although the amount of unpaid mortgage bonds was many times that of the sale price; nevertheless, the court approved it, and in Himmel v. Straus, 288 Ill. app. 566,

the committee allotted the junior interests 10% of the reorganized entity in exchange for the redemption rights, and that arrangement was approved by the court.

The plan is further objected to because of fees and expenses requested by the committee and other parties. No evidence whatever was introduced by Karasik bearing upon the question of fees, and therefore it would seem unnecessary to go into an extended discussion of this question.

After carefully examining the plan, and taking into consideration the objections urged by Karasik, we find no convincing reason why the court should not have approved the plan as fair and equitable. The plan had been approved by all of the depositing bondholders with the exception of Karasik, and no better plan has been suggested. Karasik still has the privilege of joining with the other bondholders in consummation of the plan, or in the event that he does not wish to avail himself of this privilege, his rights to withdraw his bonds are fully preserved in the decree, upon payment of his proportionate share of the committee's charges and expenses. The court still retains jurisdiction of this phase of the matter, and if the withdrawal charge is unfair the court is at liberty to revise it.

In addition to the points we have discussed, Karasik makes numerous extravagant charges of fraudulent and unconscionable conduct on the part of the committee and the trustee, all of which were overruled by the court after a full hearing. These charges were not supported by any evidence whatsoever. It is urged by Karasik that the promulgation of the plan itself was a breach of trust, that the Chicago Title & Trust Company permitted itself to be embarrassed in the performance of its duty as trustee by attempting to enter into contracts with itself for profit, in providing for the depository and for agents to perform the necessary duties in connection with the deposit of bonds, and in not objecting to periodic requests for receiver's fees; that the failure to give due notice to Karasik or his

The committee advised the trustee interests of the respondents
entirely in exchange for the redemption rights, and that arrangement
was approved by the court.

The plan is further objected to because of loss and expenses
suffered by the committee and the trustee. No evidence whatever
was introduced by Karswell bearing upon the question of loss, and
therefore it would seem unnecessary to go into an extended discussion
of this question.

It is further objected that the plan is taking into account
the objection urged by Karswell, we find no convincing reason
why the court should not have approved the plan as fair and equitable.
The plan had been approved by all of the depositing bondholders with
the exception of Karswell, and no better plan has been suggested.
Karswell still has the privilege of having his own plan
in consideration of the plan, or in the event that he does not wish to
avail himself of this privilege, his rights to withdraw his bonds
are fully preserved in the decree, upon payment of his proportionate
share of the committee's charges and expenses. The court still retains
jurisdiction of this phase of the matter, and in the withdrawal charges
is within the court in so doing to revise it.

In addition to the points we have discussed, Karswell makes
numerous allegations of fraud and unconscionable conduct
on the part of the committee and the trustee, all of which were over-
ruled by the court after a full hearing. These charges were not
supported by any evidence whatsoever. It is urged by Karswell that
the promulgation of the plan itself was a breach of trust, that the
Chicago Title & Trust Company permitted itself to be embarrassed in
the performance of its duty as trustee by attempting to enter into
contracts with itself for profit, in providing for the depositary and
for agents to perform the necessary duties in connection with the
plan of redemption, and so on and so forth in various respects. But no

counsel of the promulgation of the plan, and the holding of the sale was a violation of the trust, as was the management of the property and the refusal of the committee to return the bonds to Karasik when he indicated his dissent to the plan. In the main, these charges have no foundation in fact. Moreover, charges of similar nature have frequently been dealt with and disposed of in recent decisions, and their legal aspects have been definitely determined. (Chicago Title & Trust Company v. Robin, 361 Ill. 261; Straus v. Anderson, 366 Ill. 426; Bryn Mawr Beach Bldg. Corp. v. First National Bank, 365 Ill. 409; Himmel v. Straus, 288 Ill. App. 566.)

Lastly, it is urged that the master's sale is void, because it was held on room 337 County building, as directed in the decree, instead of room 412, as provided by rule of court. As to this objection, Karasik makes no showing that he suffered any special damage. He does not allege nor did he prove that he proceeded to room 412 expecting to attend the master's sale, and missed the same because of its being held elsewhere. He evidently knew that the decree provided that the sale be held in room 337. It was subsequent to the entry of this decree that a general rule was adopted by the judges of the Circuit court, providing that all sales be held in room 412. Both places were fully accessible to the public, and in the absence of a showing of any injury to himself, Karasik cannot attack the validity of the sale on that ground.

There are no new legal questions involved in this proceeding, the general principles applicable to cases of this kind having been clearly laid down in Bryn Mawr Beach Bldg. Corp. v. First National Bank, supra; Straus v. Anderson, supra; and Himmel v. Straus, supra. Therefore, the decree of the Superior court, in cause No. 40216, approving the plan of reorganization in connection with the confirmation of the master's sale, is affirmed.

DECKARD ARMITAGE.

Scanlan, P. J., and Sullivan, J., concur.

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CHICAGO TITLE & TRUST COMPANY,
as trustee by succession, etc.,
Appellee,

v.
ABRAHAM J. NISENBERG et al.,
defendants,
Appellees.

PHILIP A. PAULSON et al.,
interveners,
Appellees.

On appeal of MAYER KARASIK,
intervener,
Appellant.

MAYER KARASIK,
plaintiff,
Appellant,

v.
PHILIP A. PAULSON et al.,
defendants,
Appellees.

APPEAL FROM

CIRCUIT COURT,
COOK COUNTY.

299 I.A. 616²

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

In the Karasik case, No. 40217, which was consolidated with No. 40216, in which opinion has this day been filed, Karasik's complaint filed April 26, 1937, against Paulson and the other members of the committee, Chicago Title & Trust Company, as depositary, and others, it is alleged that Karasik deposited his bonds September 22, 1931, but was not informed of the contents of the deposit agreement; that he never signed the document; that it is unconscionable, inequitable and lacks mutuality; that he first learned in December, 1934, of the contents thereof, and thereupon demanded the return of his bonds, which was refused; that the committee, through its counsel, promised Karasik's attorney that it would give him notice and a copy of the plan of reorganization when promulgated and would return the bonds on demand if he dissented from the plan within twenty days after

notice; that he relied on such promise and withheld action for the recovery of his bonds; that in 1935 a decree of foreclosure was entered, and that knowledge of the reorganization plan came to him through information obtained from his counsel in March, 1937; that he thereupon intervened in the foreclosure proceeding, and filed his objections; that when he originally deposited his bonds he gave the committee his address for notification purposes as "Mayer Karasik, C/o Madison & Kedzie State Bank;" that in May, 1932, the bank was closed, and Chicago Title & Trust Company thereupon became successor trustee, and that the committee and its counsel knew ever since 1934 that Clarence Adelson was acting as attorney for Karasik, and that Karasik's address was 3401 W. Division street, c/o The Pharmacy Paper Box Company; that despite these facts, the committee deliberately mailed a copy of the plan to Karasik in care of the bank, knowing that he would not receive the letter so as to afford him the privilege of filing a dissent within twenty days from the date of mailing of the plan; that nevertheless, he attempted to file his dissent within twenty days, and tendered to the depository and the chairman of the committee his dissent, accompanied by tender of \$1,700, under protest, but that his demand was refused. It is also alleged that Eisenberg and his associates were insolvent and that despite an order entered in June, 1935, in the foreclosure proceedings, requiring the receiver and its counsel to act without compensation after July 1, 1935, and as long as the receivership net lease remained in effect, and that the receiver accepted \$645 and its counsel \$445 in violation of the order, and he sought the relief hereinbefore set forth.

Without going into an extended discussion as to the evidence, it appears quite clearly that the notice and plan were sent to the address left with the depository by Karasik, and that no other forwarding address was ever designated. By his own petition it appears that he knew of the plan within twenty days, but failed to make his dissent until after the twenty days had expired. The re-

requirements imposed upon the dissenting bondholders for withdrawing their bonds were not unreasonable, and since, as said in Himmel v. Traus, 238 Ill. App. 566, Karasik had assented to and was bound by the provisions of the deposit agreement by accepting his certificate, he could not withdraw his bonds without complying with the requirements thus imposed. We do not feel called upon to discuss at length the charges that the fees for services were exorbitant. The record indicates that the committee and its counsel had not received any fees for their services, and their request for compensation and reimbursement of cash advanced, as set forth in the reorganization plan, was not objected to by any other bondholder. Karasik adduced no evidence to show that the fees were unreasonable, and from a consideration of the amounts set forth in the schedule we think the court was entirely justified in allowing the fees requested.

For these reasons and the reasons set forth in opinion in case No. 40216, we have reached the conclusion that the decree of the Circuit court in this cause should be affirmed. It is so ordered.

Scanlan, P. J., and Sullivan, J., concur.

GEORGE CHRISTIAN,
Appellant,

vs.

PETER SMIRINOTIS,
Appellee.

APPEAL FROM COUNTY COURT

OF COOK COUNTY.

31 A 299 I.A. 616¹

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

This cause comes up on appeal from the County court for the second time. In the first instance (case no. 39093) an appeal was prosecuted from an order entered March 27, 1936, overruling a motion of defendant in the nature of a writ of error coram nobis to vacate an order of the County court entered January 3, 1935, dismissing defendant's appeal from a judgment entered in favor of plaintiff by a justice of the peace on June 11, 1930. The question presented on that appeal is sufficiently set forth in the opinion then filed. We reversed the order of March 27, 1936, and remanded the cause to the County court with directions to permit plaintiff to answer defendant's petition of March 17, 1936, to vacate the order of January 3, 1935, and "for such further proceedings as are not inconsistent with this opinion."

When the cause was redocketed in the County court plaintiff filed an answer March 4, 1938, alleging various matters in reply to defendant's petition in the nature of a writ of error coram nobis, and averring that the order of January 3, 1935, was not entered by mistake and that no error was committed by the clerk or the court, and that no error of fact appeared in the proceeding which would justify the order of dismissal of January 3, 1935; and plaintiff specially averred "that in the issue of the Chicago Daily Law Bulletin of January 4, 1935, it was plainly announced that said appeal had been dismissed by the court; and that defendant knew or should have known that the appeal was dismissed on January 3, 1935,

and that he was in duty bound, if he had any cause for moving the court to reinstate the appeal, to make such motion within sixty days after the dismissal of said appeal, in accordance with the statute in such case made and provided; and that said defendant through negligence made no such motion until more than one year after the entry of said order dismissing said appeal."

March 25, 1938, defendant filed a replication to the answer, which the court evidently regarded as a motion to strike the answer, and this motion was overruled by the court. Thereupon, without hearing any evidence, the court entered an order reinstating the cause and setting it for trial, and plaintiff appeals from that order.

In the report of the proceedings the trial court certified that it considered the document in the nature of a replication filed by defendant to be in effect a motion to strike the answer, and it overruled the motion, but that since the plaintiff did not aver that his cause of action was meritorious, the court considered that defendant's allegation that he had a meritorious defense must prevail, and that he was entitled to have the case reinstated without introducing any evidence. We think the effect of the order of the trial court was proper, but in reaching this conclusion the Judge inaptly overruled the motion to strike the answer, whereas he should have sustained it, because the answer was, in our opinion, insufficient, for the following reason: The Chicago Daily Law Bulletin of January 2, 1935, announced a call of the first 100 cases on the calendar, stating that the first ten cases on the call would be held for trial. Defendant's appeal appeared as case No. 47 on the list of cases published. Defendant was therefore justified in assuming that not more than ten cases would be called on that date and on successive days, and therefore there was no reason why he should have examined the Bulletin on the following day to look for an order of dismissal. Consequently, defendant's motion to strike

and that he was in this point, if he had any reason for not doing so, he would have been so advised. It is not the duty of the court to require the party to make such motion within a fixed time after the dismissal of such appeal, in accordance with the statute in such case, and provided, and that such defendant cannot be held in contempt for not doing so. In such case, the court should not be held in contempt for not doing so. In such case, the court should not be held in contempt for not doing so.

March 20, 1931, defendant filed a petition for writ of habeas corpus, which the court evidently regarded as a motion to set aside the verdict, and this motion was overruled by the court. Defendant, without hearing any evidence, the court entered an order setting aside the verdict and setting it for trial, and granting a new trial.

In the report of the proceedings in this case, it is stated that it considered the record in the case on a rehearing, and it overruled the motion, but that since the verdict was set aside, the case was remanded to the court for a new trial. The court considered the defendant's petition, and it was held that the case should be remanded to the court for a new trial. The court considered the defendant's petition, and it was held that the case should be remanded to the court for a new trial.

Defendant, and that he was entitled to have the case remanded without introducing any evidence. To obtain the effect of the order of the trial court was proper, and in remanding the case to the court for a new trial, the court was not required to state the reasons, because the court was not required to state the reasons, because the court was not required to state the reasons.

January 2, 1931, defendant filed a petition for writ of habeas corpus, and the court considered the petition, and it was held that the case should be remanded to the court for a new trial. The court considered the defendant's petition, and it was held that the case should be remanded to the court for a new trial. The court considered the defendant's petition, and it was held that the case should be remanded to the court for a new trial.

that part of the answer which averred that defendant knew or should have known that the appeal was dismissed January 3, 1935, should have been allowed.

In reversing the order of March 27, 1936, remanding the cause to the County court with directions to permit plaintiff to answer defendant's petition of March 17, 1936, to vacate the order of January 3, 1935, "and for such further proceedings as are not inconsistent with this opinion," it was clearly intended that the cause should proceed to hearing on the merits of the petition for a writ of error coram nobis and any answer thereto that might be filed by plaintiff, and in entering the order from which this appeal is prosecuted the court evidently intended to give effect to the mandate of this court, issued pursuant to our former opinion. Therefore the order from which this appeal is prosecuted is affirmed, in consequence of which plaintiff should be allowed to file an answer to the petition for a writ in the nature of a writ of error coram nobis, not inconsistent with the views herein expressed, and the parties should then proceed to a hearing before the court on the merits of the petition and answer.

AFFIRMED.

Scanlan, P. J., and Sullivan, J., concur.

that part of the answer which stated that defendant had no knowledge of the facts of the case was dismissed January 3, 1932, and the

case was dismissed.

In reversing the order of March 27, 1932, remanding the case to the county court with directions to permit plaintiff to answer defendant's petition of March 17, 1932, the court said: "The court is of the opinion that the answer filed by defendant on March 17, 1932, was not a proper answer to the petition of plaintiff, and that the court should proceed to hear the case on the merits of the petition for a writ of error coram nobis and any answer thereto that might be filed by defendant, and in granting the order from which this appeal is presented the court evidently intended to give effect to the mandate of this court, issued pursuant to our former opinion. Therefore the order from which this appeal is presented is reversed, in consequence of which plaintiff should be allowed to file an answer to the petition for a writ in the nature of a writ of error coram nobis, and inconsistent with the views herein expressed, and the court shall then proceed to a hearing on the case on the merits of the petition and answer.

REVEREND

Respectfully, J. J. and Sullivan, Jr., counsel.

40546

SOPHIE RINGEL,
Appellant,

v.

CHICAGO CITY RAILWAY COMPANY
et al.,
Appellees.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

299 I.A. 616^A

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

In the trial of an action on the case for negligence, resulting from a collision between a street car, owned and operated by defendants, and an automobile in which plaintiff was a passenger, the court, on defendants' motion, directed a verdict in their favor at the close of plaintiff's evidence and entered judgment on the verdict. Plaintiff appeals and the sole issue involved is whether the court erred in thus directing a verdict in favor of the defendants.

The accident occurred November 23, 1928. The facts constituting plaintiff's case, as gathered from the testimony of two witnesses who testified ten years after the occurrence and who were respectively ten and seventeen years of age at the time of the occurrence, may be summarized as follows: About eight o'clock on the evening in question, eleven persons were riding in a six passenger Studebaker automobile in a southerly direction along Kedzie avenue in Chicago. Plaintiff's father, Walter Ryjewski, was at the wheel. Three passengers, including the driver, all men, occupied the front seat. The rear seat was occupied by three women, each with a child sitting on her lap. Two persons occupied the collapsible seats between the rear and front seats. The witness, Edmund Ryjewski, plaintiff's brother, who was then ten years

ALL

100-30000

STATE OF NEW YORK
COUNTY OF ALBANY

IN SENATE
JANUARY 1, 1911
REPORT OF THE
COMMISSIONER OF THE
LAND OFFICE

ALBANY, N. Y.

THE COMMISSIONER OF THE LAND OFFICE

IN SENATE

REPORT OF THE COMMISSIONER OF THE LAND OFFICE
IN SENATE
JANUARY 1, 1911
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of age, sat on his mother's lap on the left side of the rear seat, and plaintiff, then seventeen years of age, was sitting on the left side of one of the collapsible seats. It was a rainy night and the accident occurred on Kedzie avenue near 50th street, which is a "dead street," and does not intersect Kedzie avenue on the west.

Edmund Ryjewski, plaintiff's younger brother, described the general seating arrangement of the passengers in the car, and said that he was sitting on his mother's lap at the left of the rear seat. He testified that the accident took place on Kedzie avenue between 49th and 50th streets; that just before the accident his father "was driving on the side of the street and a street car was coming north, and our car was going south. There was traffic passing to my father's right, about fifteen cars. As this traffic passed my father's right, his car went on the rails. Before the accident, with reference to the two sides of the street car rails, my father's car was on the right hand side. When my father was on the wrong side of the street, I saw a street car coming north on Kedzie. The street car was about half a block away. I heard the street car bell, and the street car hit the left side of my father's car. The left front of the street car hit our car. I don't remember anything after that." The only material evidence given by the witness on cross-examination was that, "I do not remember anything except that my father turned out on the wrong side of the street and I saw the headlight of the street car coming toward us. I remember the collision, but nothing after it."

Plaintiff, testifying in her own behalf, said that prior to the accident her father was traveling south on Kedzie avenue to the right of the street car tracks; that there were cars in front and in back of him, and that one of these cars crowded her father over to the left side. She continued:

"I saw this machine crowd my father, and he was travelling the north bound track. My father was then on the wrong side of the street at about 50th and Kedzie, it was about 75 to 100 feet from 50th. It is a dead street. At that time the street car had just

of age, sat on his mother's lap on the left side of the front seat, and pointing, then seventeen years of age, was sitting on the left side of one of the collapsible seats. It was a rainy night and the accident occurred on Hobbs Avenue near 14th Street, which is a dead street. It had been not increased Hobbs Avenue on the west.

These authors also found that the use of a single, non-specific, and non-validated questionnaire was a limitation of the study.

His car went on the radio. Before the accident, with reference to right, about fifteen cars. As this traffic passed my father's right, and one car was going south. There was traffic passing to my father's driving on the side of the street and a street car was coming north, 19th and Main street that just before the accident his father "was He testified that his mother took place on Main Avenue between that he was sitting on his mother's lap at the left of the rear seat. General seating arrangement of the passenger in the car, and said

can hit any car. I don't remember anything after that." The only lateral evidence given by the witness on cross-examination was that

"I saw this machine crowd my father, and he was traveling the north bound street. My father was then on the west side of the street, and about 100 feet from the street, he was about 75 to 100 feet from the street. At that time the street car had just

crossed 51st Street tracks, and it was coming toward us. From this east side of Kedzie, my father turned his wheels towards the west, to the right. Then the street car was coming at such a rate of speed and the motorman was sounding his bell from a distance, when all of a sudden the street car hit in the left rear of our car, the front side of it hit, the street car, and my mother was killed outright. At the time the street car and my father's car came together, my father's car was at an angle, facing south-west. From the time when the street car and my father's car came together, I was unconscious after that. *** There were several automobiles at that point travelling south and near my father. I cannot recall how many there were. Before the accident, the street car was on 51st and the motorman did sound his bell. Just before the accident the street car bell sounded several times. My father blew his horn and blew his horn. He got his front wheels and front right at an angle facing southwest, and the next thing I knew we were hit in the left rear, and after that I don't remember. Several of these cars travelling to the right of my father passed him up."

On cross-examination she testified that her father was crowded to the left by the car at his side, and in response to several questions she made the following answers:

- Q. Did the car hit him?
- A. It pushed us over.
- Q. Did it hit you?
- A. It forced us over, yes.
- Q. It knocked you over?
- A. It didn't knock us over, it just forced us over.
- Q. What part of that automobile hit your automobile?
- A. It crowded us."

She further testified on cross-examination as follows:

"The side front crowded us. It was coming towards father, and it was touching our car. It was touching the front side, with the left side of that car he was gradually taking more space, by that I mean, scraping alongside of our car. The length of the distance that it scraped alongside of our car was not a block, but about 75 to 100 feet. I didn't see the car after that. We didn't pass that automobile. It was travelling south on Kedzie. It was on the south bound track. It was at our right. It was not in the street car rails, it was on the side of our car. We were travelling on the rails. We were travelling on the south bound rails. At that time when it was crowding us, we were gradually getting over. There was a car ahead of us. We did not try to pass any car."

Although the evidence is rather uncertain as to some important phases of the case, plaintiff's witnesses testified that the accident occurred in close proximity to 50th street and that plaintiff's automobile turned on the tracks near 50th street just as the street car had crossed to the north of 51st street; also that the motorman rang his bell and plaintiff's father sounded the horn of his car. From the evidence adduced, the jury might fairly and reasonably have inferred that the motorman saw the automobile in which plaintiff was a passenger

on the north bound track and that the motorman had at least half a block in which to determine whether he ought to slacken his speed and allow the automobile to completely clear the track before proceeding past the point where the automobile was then stationed. While there is no direct evidence to indicate whether the motorman did or did not see plaintiff's car, the fact that the motorman rang the bell and that plaintiff's father sounded his horn constitutes some evidence from which the jury might have determined whether or not the motorman was aware of the danger and in the exercise of ordinary care employed the degree of caution commensurate with the circumstances to avoid a collision.

The law applicable to cases of this kind is well settled, and inasmuch as the case will have to be retried, it will serve no useful purpose to discuss the legal principles involved. We are of opinion that the court was in error in holding as a matter of law that there was no evidence of the essential facts which should have been submitted to the jury, and therefore the judgment of the circuit court is reversed and the cause is remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

Scanlan, P. J., and Sullivan, J., concur.

The North Tower struck and then the motorist was on level with
a block in which he was standing. He was on the ground in the
ground and after the accident he was completely killed. The motorist
proceeding on the road where the accident was then followed.
While there is no direct evidence as to whether the motorist
did or did not see the accident, the fact that the motorist was
the ball and that the accident was then followed by the motorist
some evidence from which the jury might have determined whether or
not the motorist was aware of the danger and in the situation of
extreme care employed the degree of caution commensurate with the
circumstances as they existed.

The law applicable to cases of this kind is well settled,
and inasmuch as the case will have to be decided, it will have to
useful purpose to discuss the legal principles involved. It is of
opinion that the court was in error in holding as a matter of law
that there was no evidence of the negligence of the driver which
been submitted to the jury, and therefore the judgment of the court
is reversed and the case is remanded for a new trial.

Reversed and remanded for a new trial.

40218

CHICAGO TITLE AND TRUST COMPANY,
as Successor in Trust,

Appellee,

v.

JOSEPH CHAST, et al.,

On Appeal of LIONEL J. LIVINGSTON,
Intervening Petitioner,

Appellant.

APPEAL FROM

SUPERIOR COURT

COCK COUNTY.

33A
299 I.A. 616⁵

MR. PRESIDING JUSTICE DENIS E. SULLIVAN DELIVERED THE
OPINION OF THE COURT.

This appeal comes to this court from an order entered in the Superior Court on February 25, 1938, approving a master's report of sale in a real estate mortgage foreclosure proceeding. The intervener was not an original party to the suit and did not appear until several years after the entry of the foreclosure decree. For some reason not plain to us he was permitted to appear in court on report of sale of the master and filed what is referred to as objections which we do not find in the abstract. Intervening Petitioner claims to have recovered a judgment in the municipal court against the owners of the fee and that at a bailiff's sale on said judgment they purchased the fee, all of which was, of course, subsequent to the mortgage lien and does not affect it in any way. He was then permitted to appear in court as an intervening petitioner and objected to the master's report of sale although he did not appear before the master and present his objections there. His objections were not made exceptions in the trial court. In addition to this he had a witness sworn who testified before the court as to some facts in connection with the master's report.

The complaint of the intervening petitioner, as we understand it is that the master took a deposit of \$1,000 in cash and some bonds,

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

1. *Chlorophyll a* (Chl a) and *Chlorophyll b* (Chl b) are the primary photosynthetic pigments in green plants. They are responsible for capturing light energy and converting it into chemical energy through the process of photosynthesis. Chl a is the most abundant pigment, while Chl b is present in smaller amounts. Both pigments are found in the chloroplasts of green plants.

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DATE 08-14-2010 BY 60322 UCBAW

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1. Having been a good boy and a student of mine for some time

1. The following information is provided by the company's management:

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As this he had a license twice the certified to give the most to

and the balance was to have been paid when the sale was confirmed. The total bid was \$50,000 and the bidder made a deposit of \$1,000 in cash and \$13,500 in bonds and the balance, as heretofore stated, was to have been paid when the sale was approved.

When a master sells property, the sale thereof is not in any sense a completed transaction, but is merely an acceptance by the master of an offer which he reports to the court and the so-called sale is not completed until the court gives its consent to the completion of the sale. Levy v. Broadway-Carmen Building Corporation, 386 Ill. 279.

As was said in Straus v. Anderson, 386 Ill. 426, at page 432:

"The officer conducting the sale acts as the agent of the court in offering the property for sale. His declaration striking off the property to the highest bidder carries with it no interest or title to the property. The bid is only an offer to buy. Until, and unless, the court confirms the report of sale made by the officer conducting the sale, there is no sale."

Even if the interveners were properly before the court, we cannot see just how they were injured in any way by the court proceedings and no such injury has been pointed out to us. While the master is bound by the terms of the decree and cannot vary therefrom, yet the entire sum was paid in compliance with the terms of the decree of foreclosure. The trial court did right in approving the master's sale in the form that it did.

For the reasons herein given, the order approving the master's report of sale is hereby affirmed.

ORDER AFFIRMED.

HEBEL, J. CONCURS;
BURKE, J. TAKES NO PART.

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40307

IGNAZIO DANILE, et al,

Appellees,

v.

SOCIETY SAN BIAGIO OF ST. BIAGIO
PLATANI, (also known as SOCIETA
SAN BIAGIO PLATANI), a corporation,

Appellant.

APPEAL FROM

CIRCUIT COURT

ADDC COUNT.

34A
299 A.A. 6171

MR. PRESIDING JUSTICE DENIS E. SULLIVAN DELIVERED THE
OPINION OF THE COURT.

This is an appeal from a decree entered in the Circuit Court wherein a member of a society which it is alleged was incorporated under the statute, not for profit, had formed a company consisting of approximately 180 members for the purpose of paying death penalties and other benefits. A dispute arose among themselves about the carrying on of the business and some of the members had been expelled from the society, particularly the plaintiffs.

Plaintiffs allege that the officers and dissenting members of the society are still conducting the business thereof, collecting dues and assessments for sick and death benefits, although they have been advised by counsel and the insurance department of the State of Illinois of the illegality of the society's continued operation.

Plaintiffs further allege that they are willing to account for any moneys which may be due to the society and are willing to abide with all court orders entered for the preservation of the society's assets and the equitable distribution of same; that plaintiffs and all other members similarly situated are being subjected to certain penalties and liabilities because of said illegal operation of the society; that the society's funds, assets and property are in danger of being diverted or diminished from its purpose by those in control, unless restrained by the court, and plaintiffs ask that the court determine the rights of all the parties and that a

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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receiver be appointed to conserve and distribute the society's assets; that the court preserve the society's funds and assets by necessary restricting orders and decree the distribution of the same among all the society's members and dissolve the said society.

The defendants' answer denies that they relinquished any right to strike the complaint filed herein and alleges that said complaint fails to state a cause of action. Further answering defendants say that jurisdiction, with regard to reincorporation or conforming to any law, is the exclusive privilege and authority of the Secretary of State or the Director of Insurance.

Defendants' answer neither admits nor denies that the society's assets are about \$4,000.00; neither admits nor denies that the defendant society has received a certificate or permit as alleged in the complaint.

A motion was made to strike the complaint, which was overruled. No motion was made to strike the answer, plaintiff, apparently being satisfied with such answer.

In some way the case got before a master in chancery, although the abstract does not show how. The abstract shows that a decree was entered April 26, 1938. The master's report was filed May 19, 1938, although an order was entered April 7, 1938, making objections to the master's report stand as exceptions and setting exceptions for hearing on April 25, 1938. On November 18, 1937, an order was entered appointing Michael A. Romano as receiver for defendant Society San Biagio Platani. No appeal was taken from this order.

As heretofore stated, on April 7, 1938, an order was entered making objections to the master's report stand as exceptions, and setting the exceptions for hearing on April 25, 1938. No exceptions appear in the abstract. This is important for the reason that

...on the basis of the evidence presented, the Commission
...that the necessary steps have been taken to ensure
...the necessary protection of the interests of the community
...among all the members of the community and to ensure
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paragraph 2 of the decree which was entered April 28, 1938, reads as follows:

"2. That the Master's report and the findings therein contained are true and correct, except as to the exceptions taken to the conclusions of law contained therein, which said exceptions have been sustained and filed with the Court and the Master's conclusions in respect to the law applicable thereto have been heretofore overruled."

We have not been privileged to know what the exceptions were to which the court refers.

In its decree the court issued the following as an order:

"It is Ordered, Adjudged and Decreed that the Master's report and findings therein contained are true and correct save insofar as this Court has sustained the exceptions filed by the plaintiffs in connection with certain conclusions of law and recommendations in regard thereto made by said Master, Wherefore it is Ordered, Adjudged and Decreed that the said report of said Master-in-Chancery, John A. Sbarbero, in all respects, otherwise than those conclusions to which plaintiffs' exceptions have been sustained, be and the same is hereby ratified, confirmed and approved by this Court."

The decree then continues:

"It is further Ordered, Adjudged and Decreed that said case be again referred to the said Master-in-Chancery, John A. Sbarbero, for the purpose of taking testimony and reporting on the persons who are members in good standing of said defendant society as of the date of the filing of the Complaint herein, to-wit, November 8, 1937, and for the reporting by said Master of the manner, method and ratio of distribution of said funds amongst the members, " " " and that said Master is to report to this Court, with all convenient speed, his findings, conclusions and recommendations reached by him in this matter.

It is further Ordered, Adjudged and Decreed that the jurisdiction to pass upon the amount to be allowed the plaintiffs for their costs and the amount to be allowed as and for their attorneys' fees in regard to this proceeding and the amount of fees to be allowed the Receiver herein for his services be and the same is hereby reserved by this Court; and the Court further retains and reserves complete jurisdiction to enter any and all necessary orders to carry out and effect the terms and provisions of this decree and to give any further directions and orders which may be necessary to distribute the assets amongst the parties entitled to same."

Thereupon there was prepared a stipulation as to the material evidentiary facts, and also a certification of purported questions of law involved in this proceeding, which procedure was doubtless intended to comply with Rule 23 of this court. The certification

Paragraph 2 of the Charter which - as will be seen - reads as follows:

as follows:

"1. The Charter of the United Nations is the only instrument which has been adopted by the United Nations Conference on Disarmament, and which is the only instrument which has been adopted by the United Nations Conference on Disarmament, and which is the only instrument which has been adopted by the United Nations Conference on Disarmament."

It is further stated in the Charter that the Charter is the only instrument which has been adopted by the United Nations Conference on Disarmament."

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of questions of law involved in this proceeding were certified to by the trial judge. The questions, three in number, are lengthy and involved, and contain so much that is not necessary, and leave out so much that is needed in order for a court to be able to give such concrete answers as would be helpful in this situation.

Rule 23 (section 3) of this court provides in part as follows:

"(3) The judge of any court of record, may, if the parties litigant assent thereto, certify any question or questions of law arising in any case or proceeding whatever which may be tried and finally determined before him to this Court, if the case is reviewable by this Court, together with his decision thereon, * * *"

The difficulty with this case coming to this court at this time is this, the jurisdiction of the case has been specifically reserved by the trial court, by its decree, for all purposes in connection therewith until its final decision is reached. There has been no final disposition of the subject-matter. This is neither an interlocutory appeal nor is it an appeal from a final decree, and as the rule applies only to cases which have been finally disposed of, we are unable to see in what manner this appeal would lie in this court. The rule, according to its terms, applies only to any case or proceeding which may have been tried and finally determined. We do not believe that in the present condition of the record this case is properly before us, and for that reason the appeal from the Circuit Court is hereby dismissed.

APPEAL DISMISSED.

HEBEL, J. CONCURS,
BURKE, J. TAKES NO PART.

40317

H. McFARLANE & COMPANY,
Appellee,

v.

BELOIT DAIRY COMPANY,
Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.
299 T.A. 617²

MR. PRESIDING JUSTICE DENIS E. SULLIVAN DELIVERED THE
OPINION OF THE COURT.

Defendant brings this appeal from a judgment entered in the Municipal Court for the sum of \$2,315.35 in favor of plaintiff and against defendant as the balance due under a written contract for the construction and mounting of two automobile truck bodies on two automobile truck chassis which chassis were furnished by defendant to plaintiff for that purpose.

Judgment in this case was entered on a motion of the plaintiff who moved the court to strike defendant's answer for the reason that it did not set up a valid defense to the claim of plaintiff.

The amended statement of claim consists of a detailed recitation of other evidence accompanied by letters and exhibits attached thereto in connection with the transaction between plaintiff and defendant.

It appears from the pleading and evidence that plaintiff and defendant entered into a written contract, whereby plaintiff agreed to construct and mount two automobile truck bodies on two automobile truck chassis, the chassis having been furnished by defendant, in accordance with certain specifications; that plaintiff was to receive payment for said work upon its completion.

It further appears from the pleadings and evidence that when the work was finished there was not, apparently, a complete or substantial fulfillment of the contract, in that the automobile truck

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bodies did not comply with the specifications; that plaintiff demanded payment for its work, but defendant refused to make payment; that on or about May 8, 1937, defendant paid plaintiff \$2,210.35 on account on the contract, withholding the balance until plaintiff should complete the work by conforming the bodies to the specifications as set forth in the contract. The plaintiff apparently admitted non-compliance with the contract and specifications as plaintiff again received the automobiles to make changes in the bodies and again returned them to defendant.

In its answer defendant recites what transpired between the parties, stating that an agreement was entered into between plaintiff and defendant to have certain bodies made for certain automobile chassis; that a dispute arose between the parties, defendant claiming that the bodies were not in accordance with the specifications; that defendant paid plaintiff \$2,210.35 on account on said contract, withholding the balance of the contract price until plaintiff would finish its work to comply with the specifications as contained in the contract.

Defendant's answer further states that thereafter plaintiff undertook to complete its performance under said contract to conform said bodies to said specifications and made the changes and alterations referred to in paragraph 3 of plaintiff's amended statement of claim, but defendant states that the changes aforesaid did not complete the performance of plaintiff under said contract in that they did not wholly conform said bodies to said specifications but said changes and alterations constituted only a minor portion of the alterations required of plaintiff to comply with the specifications of said contract.

Defendant's answer further states that plaintiff claims that in order to complete its performance under said agreement

according to its terms, to be entitled to the balance of the agreed contract price for the work called for by said agreement, it is required by plaintiff, by said specifications, to do the following: to change the shape of said bodies and the shape of the roofs and the manner of attaching the roofs to the bodies and the mouldings around the windshield windows: to make, according to the specifications, the proper allowances for expansion of the wood frame-work due to temperature changes and changes from dry to wet, and to correct the swelling of the bodies and spreading at the floor line by removal of aluminum floor corner angles and floor plates, and raising floor plates, and the removal of the entire top wood floor and insulation, and air drying same, and drawing bodies together as much as possible, and replacing insulation and cutting down and replacing floor, and leaving spacings between all boards to allow for expansion, and painting floor and all of wood frame-work with asphaltum paint, and replacing aluminum floor plates and angles with non-rusting screws and bolts, and to cut the top flange of stainless steel side kick plates and placing new angle on top to meet floor plate; replacing all aluminum mouldings on the side door openings, rub rails and rear chrome plated bus railings with brass nickel-plated screws instead of iron nickel-plated screws.

Defendant's answer further states that the work mentioned in paragraph 4 of its answer is required by the terms of said contract to be done and performed by the plaintiff in order to complete plaintiff's performance under said contract and entitle it to the balance of the contract price; that defendant has at all times been ready, able and willing, and has offered to plaintiff to make said chassis and bodies thereon available to the plaintiff, and to do all other things required of the defendant under said contract in order to enable the plaintiff to complete said work but that the plaintiff

delayed and refused to complete said work and to do the things required of the plaintiff to be done under said contract before plaintiff is entitled, under the terms thereof, to the balance of the contract price.

Defendant's answer further states that the fair and reasonable value of plaintiff's work and performance in the present form of partial completion and conformation to said specifications and said agreement is not in excess of the sum of \$2,210.35 heretofore paid by defendant to plaintiff, and the plaintiff has no further claim against defendant for the balance of the contract price unless and until the plaintiff shall perform the things required of it to be done by said contract and said specifications.

The purpose of pleading is to make an issue upon which evidence may be heard. When the motion was made by the plaintiff to strike defendant's answer thereto such motion was equivalent to a demurrer. In the municipal court practice a motion to strike a pleading has the effect of a demurrer thereto.

In State Street Furniture Co. v. Armour & Co., 259 Ill.

App. 583, the court said:

"The main question on this record, therefore, is whether, admitting all the well pleaded facts as alleged in the affidavit to be true, said affidavit states a legal defense to plaintiff's claim. * * *"

In reading these pleadings in the instant case we believe the answer sets up sufficient to take issue with the claim of plaintiff and evidence should have been heard upon the same. We are further of the opinion that the court erred in striking the answer and should have permitted the case to stand and should have heard any competent evidence offered thereon.

For the reasons herein given the judgment of the Municipal

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Court is reversed and the cause is remanded with directions to permit the defendant a reasonable time to file an answer to plaintiff's claim and to try the issues made thereon.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

REBEL, J. CONCURS,
BURKE, J. TAKES NO PART.

40328

FORD ROOFING PRODUCTS CO., a
Corporation,

Appellee,

v.

GERALD S. SERVATIUS, et al.,

On Appeal of RICHARD J. FITZPATRICK,
et al.,

Appellants.

APPEAL FROM

299 T.A. 617
CHICAGO.

36 A

MR. PRESIDING JUSTICE DENIS E. SULLIVAN DELIVERED THE
OPINION OF THE COURT.

A judgment by confession was entered in favor of plaintiff
Ford Roofing Products Co. and against defendants, Richard J.
Fitzpatrick, et al. for the sum of \$5,328.05 and costs, for principal
and interest on a judgment note.

Thereafter the defendants, appellants here, came before the
court and filed a petition and motion, stating there was no considera-
tion for the said note from plaintiff to defendants and that the
same was invalid, and prayed that said judgment be opened and that
they be permitted to appear and defend and that said petition stand
as their affidavit of defense.

This motion the court ordered entered and postponed to
March 28, 1938, and plaintiff was ordered to file a counter-affidavit
within 10 days as to diligence and that defendants reply to the
counter-affidavit within 10 days thereafter.

To the counter-affidavit filed by plaintiff there was
attached a contract of guarantee which was entered into between
plaintiff and defendants guaranteeing the purchasing of supplies by
one Servatius to the extent of \$10,000.00.

The answer of Richard J. Fitzpatrick and Irene A. Fitzpatrick
to the counter-affidavit contains the following:

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THE UNITED STATES OF AMERICA
DISTRICT COURT OF SOUTHERN DISTRICT

IN RE

VS.

JOHN J. HENNING, JR.,

Defendant.

FILE NO.

THE UNITED STATES OF AMERICA

VS.

JOHN J. HENNING, JR.,

Defendant.

THE UNITED STATES OF AMERICA

VS.

JOHN J. HENNING, JR.,

Defendant.

THE UNITED STATES OF AMERICA

VS.

JOHN J. HENNING, JR.,

Defendant.

THE UNITED STATES OF AMERICA

VS.

JOHN J. HENNING, JR.,

Defendant.

THE UNITED STATES OF AMERICA

VS.

JOHN J. HENNING, JR.,

Defendant.

THE UNITED STATES OF AMERICA

VS.

"deny that Richard J. Fitzpatrick, to facilitate sales, found it necessary to establish his own distributor, as alleged; that on and after April 17, 1938, plaintiff gave credit to Servetius for more than \$10,000, and that continuously from April 17, 1938 until Servetius discontinued business, the credit given him by plaintiff, always, and at any one time, was in excess of \$10,000, and was in excess of defendants' limited guarantee, and the merchandise for which this suit is brought to recover, was sold by plaintiff during said period of time and was in its entirety included in the credit given in excess of the limited guarantee contained in said contract of guarantee, and that these defendants are not liable under said contract of guarantee or said note given to secure said guarantee; that these defendants have been released of any liability under the contract of guarantee because plaintiff did not exercise due diligence to collect from the principal debtor; deny that plaintiff demanded of Servetius the money sued for herein, and that they therefore have been released of liability; that the indebtedness sued for herein was included neither in the contract of guarantee nor in said note, and plaintiff was not entitled to confess judgment on said note against the Fitzpatricks for said indebtedness."

We are not determining at this time whether the plaintiff should or should not recover, but we think the facts set forth in said answer are sufficient on the face of the record to have warranted and required the trial court to re-open the said judgment and to have permitted defendants to make their defense. In refusing to do that, we believe the trial court committed error.

For the reasons herein given, the judgment of the Municipal Court is reversed and the cause is remanded with directions to permit the defendants to make their defense by the introduction of evidence and proof in support thereof.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

HASEL, J. CONCURS;
BURREL, J. TAKES NO PART.

40338

JOSEPH FISHER and LAFAYETTE FISHER,
doing business as FISHER AND FISHER,

Plaintiffs - Appellees,

v.

MAX ROSENBERG,

Defendant,

HAVENSWOOD APARTMENT CORPORATION, a
corporation,

Defendant - Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

37A
299 I.A. 617⁴

MR. PRESIDING JUSTICE DEIRDRE E. SULLIVAN DELIVERED THE
OPINION OF THE COURT.

This is an appeal from a judgment entered against defendants in the Municipal Court in the sum of \$300.00, for attorneys' fees. Defendant's second amended affidavit of merits was stricken and judgment was entered as aforesaid.

Plaintiffs' filed a statement of claim alleging that they were retained by defendant to represent said defendant in all matters arising out of a certain petition theretofore filed in case No. 551603, then pending in the Superior Court of Cook County; that defendant agreed to pay plaintiffs a reasonable compensation therefor; that plaintiffs rendered certain services; that plaintiffs' services resulted in the entry of an order in said cause No. 551603, then pending in the Superior Court of Cook County, in favor of defendant, and that the plaintiffs are entitled to the sum of \$300.00 as reasonable compensation for the services rendered.

Defendant filed a jury demand and subsequent thereto filed a second amended affidavit of merits, setting up that the defendant denies that it retained plaintiffs to represent it in all matters arising out of the petition theretofore filed in case No. 551603, then pending in the Superior Court of Cook County, but that on the contrary, defendant retained plaintiffs for the sole purpose of

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responding to said petition in behalf of defendant; that defendant denies that it agreed to pay plaintiffs what is commonly referred to as a reasonable fee, but that all parties had agreed that only a nominal fee would be charged for such services as might be required; that the defendant denies that the petition theretofore filed in case No. 551603, then pending in the Superior Court of Cook County, was denied by reason of the services allegedly rendered by plaintiffs and defendant therefore denies that plaintiffs are entitled to the sum of \$300.00.

As before stated the affidavit of defendant was stricken and judgment was entered by default.

We do not see how judgment could have been entered on plaintiffs' statement of claim as it only alleges that plaintiffs were to receive "reasonable compensation" and no allegation or proof sustaining same was made as to what should be considered as "reasonable compensation", except the mere conclusion, which stated:

" * * * that Plaintiffs are entitled to the sum of Three Hundred (\$300.00) Dollars as reasonable compensation for the services rendered."

The affidavit of merits denied that the services had been rendered or that defendant agreed to pay the compensation. Further, that the agreement was for only a nominal fee and further that the agreement was that the attorney Dawson was to do the work and plaintiffs were merely to supervise the pleadings and use their name.

The statement of claim and the affidavit of merits made an issue which the court should have tried and it committed error in striking the defendant's affidavit and entering judgment.

For the reasons herein given the judgment of the Municipal Court is reversed and the cause is remanded with directions to permit the defendant to file its affidavit of merits upon which evidence should be heard and judgment entered in accordance therewith.

JUDGMENT REVERSED AND CAUSE REMANDED WITH DIRECTIONS.

HEBEL, J. CONCURS,
BURRE, J. TAKES NO PART.

40404

DR. F. H. WILLIS,

Appellee,

v.

JOSEPH A. RUENTON,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF EVANSTON.

38A 299 I.A. 618

MR. PRESIDING JUSTICE DENIS E. SULLIVAN DELIVERED THE
OPINION OF THE COURT.

This is an appeal from a judgment for \$1,324.00 entered in the Municipal Court of Evanston in favor of Dr. F. H. Willis, plaintiff, and against Joseph A. Ruenton, defendant, for services rendered by the former at the request of the defendant.

The record discloses that there is no dispute as to the services having been rendered or as to the amount asked therefor, or the offer of the plaintiff to take a lesser sum in order to get the money.

Defendant claimed that he offered to pay the bill without any deduction, but that he wanted to pay it at the rate of \$50.00 per month and insisted on paying the entire amount, but in amounts to suit himself and at times convenient to him. We cannot find anything in the record which would justify such action and we think the trial court was justified in entering judgment for the amount claimed and admitted to be due and owing.

For the reasons herein given the judgment of the Municipal Court of Evanston is hereby affirmed.

JUDGMENT AFFIRMED.

HEBEL, J. CONCURS,
MURKE, J. TAKES NO PART.

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40435

NORMAN B. PITCAIRN and FRANK J. NICODIMUS,
JR., Receivers of WABASH RAILWAY COMPANY,

APPEAL FROM

(Plaintiffs) Appellants,

SIXTH CIRCUIT COURT

v.

COON COUNTY.

GEORGE DREYFUSS,

(Defendant) Appellee.

39A 299 I.A. 618²

MR. PRESIDING JUSTICE DENIS E. SULLIVAN DELIVERED THE
OPINION OF THE COURT.

A complaint in chancery was filed against defendant-appellee and on a motion to strike, the said complaint was dismissed for want of equity and plaintiff brings this appeal. The complaint, the allegations of which we must consider as true, on such motion, defendant having filed no appearance or briefs in this court, is set forth as follows:

"That the defendant began negotiation with the Southwestern Hide Co. of San Antonio, Texas, by wire and mail, for the purchase by him of a lot of hides of which said Hide Co. was the owner, and on which the Laredo National Bank had a lien by mortgage, or otherwise, and, after several days consumed in communications, the defendant arranged for a credit in favor of the Laredo Bank with the Continental Bank of Chicago in the sum of about \$8,800, and urged the Laredo Bank to hasten the shipment of the hides with drafts attached to the bills of lading.

That the hides were shipped in two cars under order bills of lading to the Hides Co. at Chicago, which bills of lading were taken up by defendant at the Chicago Bank and mailed to the Wabash Railroad with the endorsements of the Hide Co. and defendant thereon.

That the hides arrived over said railroad a few days after loading in Texas, and said railroad mailed to the defendant freight bills on the two cars stating the kind and weight of the property and the rate per cwt. of the charges accruing thereon under the applicable and duly filed tariff, the charges on car StLBK-3044, from error in extension, being stated in the sum of \$391.36, instead of \$891.16, which bills defendant promptly paid, and which shipments were delivered as per his directions.

That the mistake in the rendition of this bill was discovered by the railroad very shortly, and corrected bill sent to defendant, who objected to paying the balance because he had purchased the hides on condition that the Hide Co. pay the freight.

That the railroad's attorney then addressed defendant by phone and by letter respecting the payment of this balance, and received the response of refusal to pay because he had purchased the hides under agreement that shipper would pay the freight.

Meanwhile, defendant rendered to the Hide Co. a statement of his payments on the shipments which were deducted from its invoice, viz.: drafts paid, \$8,831.98; freight charges paid, \$1,519.46, including this balance, due to mistake as additional freight.

That thereafter plaintiff brought suit against defendant in the Municipal Court of Chicago for recovery of this balance, alleging the transportation and delivery to defendant of the two cars of hides, the charges accruing on car Stib44-3044 under the applicable tariffs the sum of \$891.16, the rendition by mistake of bill for such charges in the sum of \$391.36, and defendant's refusal to pay the balance because he had purchased said hides on condition of the shipper paying the freight.

That defendant filed three affidavits of defense in said suit denying any mistake in the rendition of freight bills, claiming the plaintiff's acceptance of payment of the bills rendered as a release of his liability for further charges, but not denying his purchase of said hides in either.

That trial of this suit was begun on March 10th before court and jury, concluded on the next day, when verdict was returned in favor of defendant, and judgment entered accordingly, and motions for new trial and in arrest of judgment overruled, and appeal granted on condition of bond in 30 days and bill of exceptions in 60 days.

That on March 18th plaintiff made motion to set aside the judgment of March 11th because of surprise from defendant's testimony, when called as a witness in his own behalf, to effect that he had not purchased said hides or directed their shipment, and took up the bills of lading covering them at the bank solely as an accommodation to said Hide Co. or its representative then in Chicago, at his request, said motion being supported by the affidavit of plaintiff's attorney of defendant's claim over phone and in letter of purchase of said hides on condition that the shipper pay the freight, and of defendant's failure to deny such purchase in either of the affidavits of defense filed herein, which motion was denied.

That within 30 days from the entry of judgment the plaintiff presented to the court an appeal bond in the sum fixed, conditioned as required by law, and signed by a surety owning unencumbered real estate in Chicago of the value of \$10,000, which bond the court refused to approve because not made on a form used in that court.

That within 60 days from the entry of judgment a stipulation extending the time for filing bill of exceptions 20 days was filed with the court clerk for entry on the record, but was overlooked and not entered on the half-sheet.

That within the time fixed a bill of exceptions was left with defendant's attorney, who remarked that an appeal would be a waste of money, from defendant's insolvency.

That, later, an order further extending time for bill of exceptions 10 days was made.

That on June 9th plaintiff's motion for a further extension of time for such bill was denied, because the record did not show stipulation for the 20 day extension, whereupon such stipulation was produced from the clerk's office, and the court stated that order would be entered on next day extending such time until one day as of June 9th, and on next day the court stated that,

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counting said stipulation and previous order, the time for filing such bill was 30 days from entry of judgment, March 10th, which time expired on June 8th, overlooking the fact that such time runs from the day of the overruling of the motion to vacate judgment, also because an appeal bond had not been filed.

That shortly thereafter plaintiff moved the court to correct the record to show entry of judgment on March 11th instead of March 10th and further extend time for filing bill of exceptions nunc pro tunc as of June 8th, supporting such motion with the affidavit of plaintiff's attorney that the trial of case was begun on March 10th and continued to following day, and offer of the Municipal Court record of March 10th to same effect (such motion was denied, and again renewed within 30 days thereafter, and again denied with leave to file bill of exceptions respecting such motions within 30 days, which was duly presented, and so marked, but not signed).

That following failure to obtain return of the bill of exceptions from defendant's attorney, and secure further time for filing such bill, plaintiff's attorney wrote the said Hide Co. informing it of defendant's testimony, that he had not purchased said hides or directed their shipment, and had taken up said bills of lading solely as an accommodation to it or its representative then in Chicago at his request; and requesting information as to the same, and its response, that the hides were sold to defendant and shipped by his direction, full particulars of which were in the hands of a certain law firm in Chicago representing it.

That in August plaintiff's attorney was afforded, by said law firm, inspection of the telegrams and letters which had passed between defendant and said Hide Co., and of the declaration filed in a suit which had been instituted by defendant in the Circuit Court of Cook County against said Hide Co. for damages from inducing him to purchase said hides by false representations of their grade and condition, said declaration being sworn to by defendant before his attorney.

That in September, plaintiff presented to the said trial judge a petition to vacate the judgment rendered as aforesaid, reciting the proceedings had in said suit, particularly the testimony given by defendant that he had not purchased said two cars of hides or directed their shipment, and took up the bills of lading covering them solely as an accommodation to said Hide Co. or its representative, and calling attention to a suit which defendant had instituted in the Circuit Court of Cook County, Illinois, against said Hide Co. for damages in inducing him to purchase said hides by false representations as to their grade and condition, and of defendant's swearing to the declaration filed therein before his attorney in this suit.

That said judge refused to hear said petition and directed that it be impounded and refused to allow an appeal therefrom.

That within 30 days thereafter plaintiff presented to said judge a bill of exceptions upon his motion respecting said petition, which was so marked by him, but not signed.

That defendant's said suit against said Hide Co. was dismissed for want of prosecution.

That, later, plaintiff renewed the motion for the signing of said bill of exceptions, which was denied.

That thereafter plaintiff sued out of Appellate Court of Illinois, First District, in Cause No. 37282, a writ of error for

the review of the aforesaid proceedings, orders and judgment, in which said Appellate Court refused to grant a petition for mandamus requiring said judge to sign said bills of exceptions so presented to and so marked by him, and held: that the affidavit in support of the motion to vacate the judgment could not be considered as to evidence given at the trial because a substitute for a bill of exceptions; that a court record could not be corrected upon facts shown by affidavit and the official organ of the court showing orders entered on the day of issue and the cases to be called on the succeeding day for trial, and that the motion to vacate the judgment of March 11th, made on March 18th, constituted a bar to a subsequent petition to vacate such judgment and affirmed said judgment.

That the Municipal Court Act provides that its judgments may be vacated upon bill in equity.

That said judgment was based upon and obtained through false, perjurious and fraudulent testimony, wilfully and designedly given for the purpose of procuring its rendition, and thereby plaintiff was denied recovery upon a just and lawful demand."

As heretofore stated, defendant filed no briefs in this court.

A reading of this bill shows that the mistake, which was the cause of plaintiffs' loss, was the Railroad Company's mistake and was not in any sense a mutual one. Further considering the bill, it is quite apparent that they selected the tribunal for the hearing of their grievances, namely, the Municipal Court, and there received an adverse decision. From that decision the case was appealed to this court, being Cause No. 37283, entitled, Seabash Railway Company v. Otto Dreyfuss, in which the substance of the charge made in that bill was passed upon at that time by another division of this court. In its opinion this court said:

"It is also urged in one of its counsel's affidavits that May 24, 1932, plaintiff turned over its bill of exceptions to defendant's attorneys for examination and approval or correction with the understanding and agreement that it was to be returned for settling and approval by the court June 2, 1932, and that they willfully refused to return same. We find no substantiation for this contention in the record and it is sufficient to state that if defendant's attorneys were guilty of any such conduct the court was available for redress.

September 9, 1932, plaintiff filed a petition in the nature of a bill in equity to vacate the judgment. We are of the opinion that the court was justified in refusing to consider this petition. Section 21 of the Municipal Court Act gives to the Municipal Court power to vacate a judgment on such a petition only in cases where

no motion to vacate it is made within thirty days after the entry of the judgment, and in this case such motion was made and denied within thirty days from the entry of the judgment. (*Flora v. Fields*, 126 Ill. App. 341). An order denying a motion made within thirty days after its entry to vacate a judgment of the Municipal Court is final and no subsequent motion to vacate it will lie, but the only method of reviewing it is by appeal or writ of error."

From a reading of this bill and the cases cited by plaintiffs, we are satisfied that the trial court was right in sustaining defendant's motion to strike the complaint. In order to sustain a bill of complaint in equity, it is necessary that the fault shall not be that of the plaintiff. Such does not appear in this case. Plaintiffs have availed themselves of all the remedies which the law provides, including an appeal to this court, and we do not think that a review of the entire proceedings, including the decision of this court from which we have quoted, is a proper subject-matter for a complaint in equity.

For the reasons herein given the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL, J. CONCURS,
BURNS, J. TAKES NO PART.

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*Fugitive who has been charged with murder; subject was shot to

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40451

OSCAR SCHOROW,

Appellee,

v.

BESSIE SCHOROW,

Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

40A 299 I.A. 618²

MR. PRESIDING JUSTICE DENIS E. SULLIVAN DELIVERED THE
OPINION OF THE COURT.

Defendant Bessie Schorow brings this appeal from a decree
of divorce entered against her and in favor of her husband Oscar
Schorow on February 1, 1934 in the Superior Court, and also from
an order entered May 20, 1938, denying the petition of Mary Trager,
conservatrix.

Plaintiff's bill charged extreme and repeated cruelty,
alleging that physical violence had been perpetrated against him
by his wife. There was also on file at that time a cross-bill by
defendant asking for separate maintenance, charging desertion for
more than one year and that defendant was living separate and apart
from plaintiff through no fault of her own.

At the time of the hearing Bessie Schorow was an inmate of
the Illinois Hospital for the Insane at Dunning, Illinois, where
she had been committed on the petition of her husband.

The parties were married May 28, 1918, at Chicago, Illinois,
and as the result of said marriage one child was born and at the
time of the filing of the complaint the child was 14 years of age.
The parties lived together in Chicago as husband and wife, plaintiff
says, until December 22, 1927, and defendant contends until February
1, 1928.

Plaintiff filed his bill for divorce on October 24, 1933,
charging extreme and repeated cruelty. On November 22, 1933, there
was appointed a guardian ad litem for defendant, and the following

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day said guardian obtained leave to employ counsel. On November 28, 1933 an answer was filed and also a cross-bill for separate maintenance, based on a charge of desertion. The evidence was heard January 11, 1934.

Plaintiff testified that on June 5, 1923, the defendant became angry and hit him with a mop stick; that Louis Golinkin was present at the time; that on July 19, 1925, the defendant hit him on the leg with a chair and that he never gave her any cause to strike him on either occasion. Plaintiff further testified that on December 22, 1927, the defendant struck him in the face with her fist, leaving marks on him; that he left on that date and never lived with defendant after that time.

Louis Golinkin testified that he was present June 5, 1923 and saw the defendant strike the plaintiff with a stick and that about December 22, 1927, he saw marks on plaintiff which plaintiff said he got from his wife.

No evidence was offered as to the seriousness of any injury that was sustained at the time of these alleged assaults, or whether they were intentional or accidental, or that plaintiff attempted to prevent his wife from striking him.

On February 1, 1934, a decree of divorce was entered granting plaintiff custody of their minor child, allowing \$25.00 fees each to the guardian ad litem and his attorney, and stating that the plaintiff had offered to deposit \$50.00 in the Harris Trust and Savings Bank for burial expenses of the defendant, subject to the order of court.

On July 16, 1931 plaintiff filed a petition in the Probate Court of Cook County and was appointed conservator of the estate of the defendant. On October 14, 1937, the plaintiff, by order of the Probate Court, was removed as conservator and Mary Proger, defendant's sister was appointed as conservatrix.

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On 12/12/54, the following information was received from the Bureau of the Census, Washington, D.C.:

On October 23, 1937, the conservatrix filed a petition in the Superior Court case charging that the divorce decree entered February 1, 1934 was fraudulently obtained by false and perjured testimony, denied the alleged acts of cruelty and stated that at the time of the alleged act of cruelty on December 23, 1927, the defendant was confined in the Lutheran Deaconess Hospital and said petition prayed that the decree be set aside and declared null and void, it also prayed for support, attorneys' fees and general relief.

An answer denying the charges of fraud was filed February 11, 1938.

At the hearing plaintiff was called as a witness by the conservatrix, under Section 60 of the Civil Practice Act, and testified that on February 1, 1928 he filed a petition to have the defendant committed to the Hospital for the Insane at Gunning and that on July 16, 1931 he filed a petition in the Probate Court to have himself appointed conservator of his wife's estate.

On May 25, 1938, by order entered in the County Court, the defendant was restored to reason and on July 10, 1938, an order was entered suggesting her restoration and providing that the cause proceed with Bessie Scherow as defendant in her own proper person.

Plaintiff filed her notice of appeal on July 14, 1938, and prosecutes this appeal under Paragraph 250 of the Civil Practice Act, which provides that as to appellants who are infants or non compos mentis, the period of disability shall be excluded when computing the time in which the appeal shall be perfected. Under the facts here, this gave defendant 90 days in which to perfect an appeal.

When this matter of disability was called to the attention of the trial court it appointed a guardian ad litem, as was its duty, to protect the interests of the insane person. After he was appointed, a cross-bill was filed by the guardian ad litem on behalf of the

defendant insane woman, asking for separate maintenance on the grounds of desertion and stating that she was living separate and apart from her husband without fault on her part. This was never put at issue, by requiring an answer, and no attempt was made to offer evidence in support of the claim of the insane woman.

When the plaintiff testified no objection was made as to his competency. He was ~~xxxxix~~ incompetent and should not have been permitted to testify. As the court said in Morrison v. Morrison, 241 Ill. App. 353:

"It being conceded that appellee was mentally incompetent and had been committed to an asylum for the insane, appellant was not a competent witness in a suit against her."

In Holton v. Dunker, 198 Ill. 407, it was held that under Section 2, Chapter 51 of the Revised Statutes, entitled "Evidence and Depositions" the parties in interest were disqualified as witnesses as against an insane defendant.

In this court the point is raised in the instant case that no objection was made by defendant. As the Supreme Court stated in the case of Carterwright v. Rice, et al, 14 Ill. 417, at 418:

"It is true, the guardian ad litem raised no objection to the competency of the witness. But this cannot prejudice the rights of the defendant, whom he represented. The guardian could waive none of his rights. They are committed to the protection of the court, whose duty it is to notice legitimate and substantial objections in such a case, whether raised by the guardian or not."

It was error to permit plaintiff to testify. When the attention of a court has been called to the fact that a minor, insane person or any other disqualified defendant is present without representation, it is the duty of the court to appoint a representative for such person. This, however, does not relieve the court of the necessity of looking after the interests of its ward. The appointment of the representative is merely an aid to the court and does not in any way relieve the court of the responsibility of seeing that the rights of such a defendant are protected. It is the duty of the trial court

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to see that the guardian ad litem or such person's representative protects in every way the legal rights of the court's ward. It is not only the duty of the trial court to see that no incompetent evidence is admitted, but the court should also see, upon an inspection of the pleadings, that the cross-bill was either defaulted as to the plaintiff, or placed at issue and that evidence was produced in regard thereto.

The contention of the plaintiff in this court is that the law is well settled that where no answer is filed to a cross-bill and the parties go to a hearing on the bill of complaint and answer thereto, the cross-bill may be considered as abandoned. Such could not be true in the case of an insane ward of the court, where material rights if proven would necessarily defeat the cause of action of the plaintiff.

Plaintiff further argues in this court that the filing of a petition was not the proper way to vacate a decree in a divorce case. The same was not challenged in the trial court by a motion to strike, but issue was taken by filing an answer and hearing evidence. In this court no motion was made to dismiss the appeal, but issue was joined in this court by filing briefs and such question cannot be raised now for the first time.

The decree of divorce provided that \$50.00 be deposited with the Harrie Trust and Savings Bank to pay for the defendant's funeral. The plaintiff in this cause having had himself appointed conservator of his wife's estate, then having had her committed to an insane asylum and then having succeeded in having a decree of divorce entered against her, we presume the offer to deposit the sum of \$50.00 might be considered as unusual.

From a review of the record we do not think there is any competent evidence offered in this case, even approaching the required

proof, to sustain the decree entered in the trial court. The manifest weight of the evidence is against the plaintiff and either at the time of the original hearing or at the hearing on the petition in the nature of a bill of review, the bill for divorce should have been dismissed for want of equity.

For the reasons herein given the decree of the Superior Court is reversed.

DECREE REVERSED.

HEBEL, J. CONCURS,
BURKE, J. TAKES NO PART.

40461

IDA ROSCHE,

Appellee,

v.

JOHN ROSCHE,

Appellant.

SUPREME COURT

CIRCUIT COURT

CCOR 30 NTY.

299 I.A. 618

MR. PRESIDING JUSTICE DENIS E. SULLIVAN DELIVERED THE
OPINION OF THE COURT.

A decree of divorce was entered in the Circuit Court in
favor of plaintiff Ida Rosche and against the defendant John Rosche
on the charge of cruelty, from which decree defendant brings this
appeal.

The decree entered by the trial court granted the plaintiff
a divorce and awarded her the complete title to a two apartment
building located in Forest Park, Illinois, together with all the
furniture and furnishings therein and ordered the defendant to vacate
a room which he had occupied in his apartment for years, within
twenty-four hours of the entry of said decree and restrained and
enjoined the husband from entering his said home.

The decree further provided that there should be paid to
plaintiff the sum of \$118.50 for attorney's fees and court costs.

Plaintiff is 63 years old and her husband, defendant herein,
is 71 years of age. The three children, all born of this marriage,
are adults and married. The parties to this suit were married in
1894, and lived together as husband and wife until separated by
the entry of the decree herein dated July, 1938.

In her complaint plaintiff alleges three specific acts of
cruelty as follows: On October 1, 1935, she alleged defendant
seized her by the throat with both hands, choking her and threatening
to kill her; on March 31, 1936, defendant struck plaintiff; and on
April 30, 1937, defendant struck plaintiff with his fist and pushed

her violently against an icebox in her home, causing pain and injury to her shoulder, etc.

Plaintiff further alleged that she was the owner in fee simple of real estate in Forest Park, Illinois, together with all the furniture and furnishings therein, and that defendant occupies a room in plaintiff's apartment, but that the parties hereto have not cohabited as husband and wife for over five years last past because of his cruel treatment; that defendant maintains his own room and does his own cooking, while plaintiff does his laundry work and that defendant has not contributed to the support of plaintiff and their children for the past seven years, although well able to do so, and that defendant has refused to move from said premises and live elsewhere.

Plaintiff further alleged that defendant has a considerable amount of cash, bonds and notes, which plaintiff believes amount to several thousands of dollars, which are the joint property of the parties hereto, but defendant refuses to give plaintiff her share thereof, and further alleges that the defendant is the owner of two and one-half acres in Burnee, Illinois, and that plaintiff is entitled to a half interest therein.

Defendant's answer denies each of the acts of cruelty alleged in the complaint and avers that since November 10, 1933, plaintiff willfully and intentionally deserted the defendant, and in his counter-claim defendant prays for a divorce on the ground of desertion.

Defendant further denied that plaintiff is the sole owner of the Forest Park real estate, but avers he has an undivided half interest therein, and alleges that the same was purchased out of his funds and earnings; denies that he has failed to support plaintiff and their children, or that he has any considerable amount of cash, bonds or notes, but admits that he is the title owner of two and one-half acres in Burnee, and avers that he is 70 years of age and

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the East (CLPE) in the United States. The Commission is therefore unable to determine whether the CLPE is a legitimate organization or a subversive one.

and one-half acres in number, situated and more particularly described as follows:

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is not able-bodied, and that he is unable to secure employment because of his age.

Defendant's counter-claim follows the allegations of his answer and avers that the parties accumulated sufficient funds out of his earnings to purchase the apartment building in Forest Park and that defendant made certain improvements thereon which were paid for out of his earnings, and that title to the same is held by plaintiff, although defendant is entitled to an equal interest therein, and although plaintiff has often promised to place the property in joint tenancy, she has failed to do so.

Defendant avers that he purchased the two and one-half acres in Gurnee out of his own earnings and that title is in his own name, but admits that plaintiff is entitled to an equal interest therein. Defendant prays for an accounting as to the rents collected from the apartment building by plaintiff and prays that the title may be equally divided, as well as the household furniture.

The decree of the trial court awarded plaintiff a divorce and awarded the apartment building to her, together with the furniture, and ordered defendant to vacate the same within 24 hours and enjoined him from entering said premises, etc.

Defendant's theory of the case is that the preponderance of the evidence was not with plaintiff, and did not justify the entry of a decree for divorce. Also, that the evidence admittedly shows that inasmuch as both husband and wife contributed to the purchase and upkeep of the family apartment dwelling, that, therefore, it was entirely inequitable to divest the husband of all interest in said apartment building and strip him of everything he had in the world.

The testimony in this case is not sufficient to sustain the decree. The plaintiff did not testify as to the charges made against her husband, except when the answers were suggested by leading questions. In several instances plaintiff "guessed" that that was

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true in answer to questions put to her in a suggestive form. The happening of October 1, 1935, where the charge is made that defendant choked and threatened the plaintiff, she said that he kicked her. As to the incident in the kitchen, when the dispute was had with the decorator, where it was claimed that defendant pushed plaintiff against the ice box, no one testified whether such act was accidentally done or if he purposely injured her.

It further appears from plaintiff's testimony that defendant is living in the same apartment with her, although she says she occupies a separate room. The decree finds that they have not cohabited as husband and wife, although there is no evidence of this fact and, if it is true, whether this resulted from natural causes or intention.

Plaintiff stated that she does defendant's washing, and apparently willingly. The evidence shows that the parties have not separated, except as they must separate in response to a decree of the court. We do not think it is the function of a court to separate married people if they do not voluntarily separate themselves. The public policy of the State is that couples be encouraged to live together and to sustain the marriage relation, rather than to separate them. Certainly, it is not one of the provinces of a court to order a separation which has not already taken place.

We are of the opinion that the court erred in entering this decree as the manifest weight of the evidence is against plaintiff.
Therefore, for the reasons herein given the decree of the Circuit Court is reversed.

DECREE REVERSED.

HEBEL, J. CONCURS.
BURKE, J. TAKES NO PART.

There is a great deal of confusion in the mind of the public as to the meaning of the word "freedom". It is often used to mean the freedom of the individual to do as he pleases, without regard to the rights of others. This is the freedom of the "free market", and it is the freedom of the "free press". But there is another freedom, the freedom of the individual to be free from the interference of others. This is the freedom of the "free man", and it is the freedom of the "free state".

It is the freedom of the individual to be free from the interference of others. This is the freedom of the "free man", and it is the freedom of the "free state". It is the freedom of the individual to be free from the interference of others. This is the freedom of the "free man", and it is the freedom of the "free state". It is the freedom of the individual to be free from the interference of others. This is the freedom of the "free man", and it is the freedom of the "free state".

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THE
LIBRARY OF THE
CONGRESS

40258

MICHAEL GLOWITZ,

Appellant,

v.

ARMOUR AND COMPANY, an Illinois corporation,
R. M. GABELL, A. BATSON ARMOUR, LAURENCE
ARMOUR, LESTER ARMOUR, PHILIP D. ARMOUR,
SEWELL L. AVERY, HENRY W. BOYD, D. A.
CRAWFORD, CHARLES F. CURTISS, CHARLES J.
FAULKNER, JR., WYOMOUTH KINKLAND, JAMES R.
LEAVELL, JAMES A. MCDONOUGH, D. R. MCLELLAN,
ARTHUR SEEKER, HARRY C. MILLS, PHILIP L.
REED, CHASE ULMAN, ELISHA WALKER, S. WAYNER
SALLAGE and FREDERICK G. FRISOL,

Appellees.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

299 I.A. 618⁵

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On April 30, 1937, plaintiff filed his amended complaint in chancery in the Superior Court of Cook County, and alleged that on May 28, 1934, he was the holder of 10 shares of 7% preferred cumulative stock of Armour & Company, an Illinois corporation, one of the defendants, which, with other stock, he had purchased 15 years before; that on May 28, 1934, the outstanding shares of the corporation were (a) 573,313 shares of 7% \$100.00 per cumulative preferred and (b) four million shares of \$25.00 per common, two million of Class A and two million of Class B; that under the corporate contract, the preferred shares were entitled to receive dividends of 7% out of net profits when declared by the board of directors, and nothing in excess of 7%, no matter how large the net profits were; that (1) preferred dividends were cumulative; (2) a reserve of one year's preferred dividends was to be maintained; (3) that no shares prior to preferred could be issued, nor on a parity with them unless net earnings were twice the amount required for dividends for the total number of existing and proposed shares; (4) no merger could effect preferred; and on liquidation, voluntary or involuntary, preferred

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received all accumulations plus its \$100.00 par value before any distribution to common; on redemption the same plus \$15.00; (5) no change in the character, class or amount of shares could be made contrary to the charter, and no amendment to that charter could effect the rights of the preferred; that common shares were subordinate to preferred, and were entitled to receive all remaining net profits; that dividends on preferred were paid continuously from 1923 to January 2, 1934; that thereafter arrearages accumulated until by May 28, 1934, they totaled \$29.50 per share or some 16 millions of dollars; that no dividends were ever paid on Class B common and none on Class A after 1925; that on May 28, 1934, the officers and directors purported to adopt a plan of recapitulation providing for: (1) the issuance of a class of new \$5 no-par preferred shares prior to plaintiff's old preferred, and for the issuance of a new class of common shares; (2) for the exchange of each old preferred share for one new prior preferred share, plus two new common shares, and (3) the cancellation of old preferred accumulated dividends and priorities; that in connection with the plan, complicated financial data and masses of figures were involved relating to the defendant company and over five hundred separate units in all parts of the United States and foreign countries ranging from packing and sashona plants to curled hair factories; that this required consideration of consolidation of earnings and income of the foregoing units, determination of reserves, capital and earned surpluses, income and expenses, provisions of mortgages and other corporate documents relating to the retention of the foregoing, and limiting the declaration of dividends, depreciation policies, inventory, fluctuations and other manifold details in the huge corporate structure and system which affected its financial position; that complicated legal questions arose relating to the effect on the

then recent Business Corporation Act of 1933 upon rights created under prior acts; the power of the company or its shareholders to disregard the terms of contract of plaintiff and other preferred shareholders by issuing purportedly prior shares; the power of the Legislature under the Federal and State Constitutions to authorize changes in corporate charters in such cases; the rights of minority shareholders; and the application to the complex dividend relationships of parent and subsidiaries of laws of many states and foreign countries; that plaintiff and a great majority of the preferred shareholders had no technical, legal or accounting skill, that the foregoing financial and legal material was utterly beyond their ability to grasp, analyze and interpret, and could not have been known or deemed to have been known or reasonably available to them; that at the solicitation of defendants, plaintiff purportedly exchanged his old 7 1/2 cumulative preferred shares under the plan for 10 new preferred and 20 common shares; that the new preferred was stated to be prior in dividend and liquidation rights to old preferred and was a 6% convertible cumulative share without par value, and that plaintiff did not vote for the plan; that plaintiff and a great majority of old preferred shareholders believed, at the time of making the exchange, that (1) the company and a majority of its shareholders could by voting in favor of the plan, compel the minority to cancel accumulations and other priorities; (2) that the required majority had approved the plan and therefore the cancellation of priorities was binding; (3) that if they did not exchange their shares they would receive no future dividends, and that the non-assenting old preferred would not receive accumulated dividends; (4) that there were no funds available for dividends, nor any feasible way of obtaining them without sacrificing priorities; (5) that a number of defendants held only old preferred shares so that their

personal interests were identical with plaintiff's, and did not have personal interests inconsistent with those of preferred; that the foregoing beliefs were material to the interests of the plaintiff, the subject matter of the contract of exchange, and in inducing plaintiff and 85% of old preferred shareholders to exchange their shares; that without the foregoing beliefs as to the financial situation, their rights, the necessity of exchanging their shares, and the personal interests of defendants, plaintiff and a great majority of old preferred shareholders would not have exchanged their shares and sacrificed accumulated dividends, as the amount of accumulated dividends alone which they sacrificed on one share (\$39.50) would have purchased at least 29 shares of old common; in fact, the foregoing beliefs were mistaken and false because, in truth, accumulated dividends and priorities could not be cancelled by a majority of shareholders and the plan did not legally bind plaintiff and other minority old preferred shareholders; that in truth in December, 1936, all remaining old preferred shareholders who had not exchanged their shares did receive accumulated dividends, after suit had been filed on their behalf, and that if plaintiff had not exchanged his shares, he too would have received such accumulations; that in truth there were numerous feasible methods of making funds available for dividends without sacrificing old preferred shareholders' accumulated dividends and priorities; that in truth the personal interests of defendants as shown hereinafter were directly contrary to those of old preferred shareholders; that the plaintiff and a majority of old preferred shareholders were ignorant of the rights and of the foregoing data and would not have exchanged their shares if they had known the true situation; that for their knowledge on these exceedingly complex questions, plaintiff and other preferred shareholders necessarily relied upon the communications and representations made by defendants directly and indirectly through purportedly independent committees;

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that the old preferred shareholders consisted of over 18,000 individuals with the majority of holdings being less than 10 shares, and that they were scattered widely over the United States and foreign countries; that the defendants had full knowledge of the legal and financial data involved as officers and directors of defendant company and its subsidiaries, and that a majority of them or their relatives had been directors continuously from the time of issuance of plaintiff's shares; that they had available a written legal opinion concerning the rights of plaintiff and old preferred shareholders, and advance and detailed information through reports of auditors and other experts as to the financial situation; that defendants were in a fiduciary and confidential relation requiring the highest degree of fidelity and good faith because defendants were directors and officers of the company and agents and proxies for preferred shareholders; that they had control over large blocks of shares and were in a position of extraordinary domination and control (1) because shareholders were widely scattered and numbered over 40,000 individuals; (2) that there was available to defendants without personal cost a force of 800 company men for solicitation of proxies and exchanges, while the cost of independent solicitation was prohibitive; (3) that they had control of 3800 offices and directorships and ^{of} innumerable lucrative contracts including yearly legal fees of \$94,000.00, appraisal fees of \$86,000.00, accounting fees of \$130,000.00, and fees of 2-1/2 millions of dollars for refunding operations; (4) that they had control of the dividend policies of the company and its numerous subsidiaries, transfers of funds between them and their utilisation for purchases of property, retention of securities in company treasuries, redemptions and other matters; policies and practices which affected the apparent condition of the company's affairs and ability to pay dividends; (5) that they had

any and all information that may be obtained from the company's records, including but not limited to, the company's financial records, personnel records, and other records, and to the extent that such information is not already in the possession of the company, to cause the company to obtain such information from the appropriate sources. The company agrees to provide the information requested by the committee in a timely and complete manner, and to cooperate with the committee in its investigation of the matter. The company also agrees to provide the committee with a written report of its findings and conclusions, and to make such report available to the committee in a timely manner. The company further agrees to take such steps as may be necessary to prevent the recurrence of such violations in the future. The committee reserves the right to conduct such investigation as it deems appropriate, and to take such action as it deems necessary to enforce the company's policies and procedures. The company agrees to indemnify and hold the committee harmless from and against all costs and expenses, including reasonable attorneys' fees, incurred by the committee in connection with its investigation of the matter. The company also agrees to reimburse the committee for any travel expenses incurred by the committee in connection with its investigation of the matter. The company further agrees to provide the committee with such other information as may be necessary to enable the committee to conduct its investigation of the matter. The company agrees to provide the committee with a written report of its findings and conclusions, and to make such report available to the committee in a timely manner. The company also agrees to take such steps as may be necessary to prevent the recurrence of such violations in the future. The committee reserves the right to conduct such investigation as it deems appropriate, and to take such action as it deems necessary to enforce the company's policies and procedures. The company agrees to indemnify and hold the committee harmless from and against all costs and expenses, including reasonable attorneys' fees, incurred by the committee in connection with its investigation of the matter. The company also agrees to reimburse the committee for any travel expenses incurred by the committee in connection with its investigation of the matter. The company further agrees to provide the committee with such other information as may be necessary to enable the committee to conduct its investigation of the matter.

control of the company records through which they could make an examination of the financial situation or attempt to contact stockholders, as was done when one M. Robinson attempted to examine the books, and when plaintiff tried to do so; that preferred shareholders, including plaintiff, reposed special trust and confidence in certain of the defendants, including W. H. Prince and J. A. McDonough who organized a shareholders' protective committee and represented to plaintiff and old preferred shareholders in soliciting and obtaining widespread support, that accumulated dividends and priorities could be protected; that defendants had a definite personal financial interest, adverse to preferred shareholders, in that they owned 750,000 common shares, acquired in some cases for as little as 18¢ per share, and at least 112,000 shares of which was acquired after the plan was announced; that the common shares had no value, having received no dividends since 1935, and that defendants stood to gain 5 million dollars in capital value and 2-1/2 millions per year in dividends by wiping out accumulations on preferred; that other facts showing bias will be disclosed by an examination of the books which defendants have refused to permit; that defendants seriously contravened their fiduciary duties by misrepresentations, concealment, non-disclosure and other inequitable or fraudulent conduct, which caused, induced and aided in creating the mistaken beliefs of old preferred shareholders, including plaintiff, in obtaining proxies from, and the support of, old preferred shareholders, and induced them to accept the plan, exchange their shares and sacrifice their accumulated dividends and priorities; that to induce old preferred shareholders to accept the plan, defendants represented in writing that they would fully explain the rights of shareholders under the plan; that this representation was grossly false in that defendants actually and intentionally gave incorrect information as to old preferred rights as follows: Defendants falsely represented that approval by a majority

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of shareholders bound the nonassenting minority, and that the plan had been so accepted and was binding on plaintiff, in fact, a majority approval could not bind the minority or deprive them of accumulated dividends and priorities; that defendants falsely represented that if preferred shareholders did not exchange their shares, they would not receive future dividends nor past due accumulations, in fact, old preferred shareholders who did not exchange their shares later received all unpaid accumulations in full after suit had been filed against defendants; that defendants falsely represented that the company's financial situation was such that it had the right to issue shares prior to old preferred, when in fact, the contrary was true; that defendants made other false representations which their refusal to permit examination of the books makes it impossible to allege; that to induce the preferred shareholders to accept the plan, defendants falsely represented that the net assets of the company were less by 35 millions of dollars than the stated capital, and that therefore no dividends could be paid unless a plan was adopted cancelling accumulations, in fact, net assets were 30 millions in excess of stated capital; cash on hand totaled 11 millions; earned surplus, 9 millions; and income available for dividends for 1933 was \$7.45 per share, and for 1934, \$11.78 per share, so that dividends could have been paid without wiping out accumulations, and that current assets were in the ratio of 8 to 1 to current liabilities, as compared with 3 to 1 for the previous 10 years; that the representation was further false in that there existed numerous feasible methods of permitting payment of dividends, namely (1) by direct reduction of stated capital under the Illinois Bus. Corp. Act; (2) reduction of the par value of the shares effecting a reduction in stated capital; (3) redemption of old preferred by a refinancing loan and (4) other methods including cancellation of treasury shares, and accounting practices used by defendants; that the defendants falsely represented

the financial situation of the company by manipulation of the complex corporate structure through inter-subsidary transactions and book-keeping entries pursuant to a general scheme to conceal funds available for preferred dividends and otherwise minister to defendant's conflicting personal interests, and as examples of the manipulations and further misrepresentations, the following may be cited: (a) Merely by voting the shares of a wholly owned subsidiary, without the knowledge or consent of preferred shareholders, defendants increased the surplus of the consolidated parent company by 80 millions of dollars; (b) Seven millions of dollars of cash held in escrow pending a court decision was set up as an expense and carried as a liability on the books, thus concealing a potential fund for dividends; (c) Thirty millions face value of securities of the corporate system were purchased by defendants with funds that could have been used to pay dividends; that instead of cancelling these securities and thus releasing further funds for dividends, defendants ordered the securities to be held in subsidiary treasuries as they were required to be treated as an outstanding liability in determining whether there were net assets available for dividends, and that this was done after 1931 while accumulations were piling up; (d) earnings were retained in the treasuries of subsidiaries so as to misrepresent ability of the parent to pay dividends. On the other hand, where it served their purposes, as in 1928, defendants through stock control did the contrary and squeezed all subsidiary funds into the parent, showing earnings of 18-1/2 millions of dollars, and re-funding operations of 180 millions of subsidiary securities carrying as high as 7 1/2 percent interest were delayed to prevent making the savings available for preferred dividends; (e) Properties were carried on the books at appraisals which were not uniform and falsely represented the situation that in 1933 the value of the properties was stated to be 218 millions,

and in 1934 the defendants represented it to be 55 millions less; that entire properties were transferred to and from among subsidiaries in over 1800 separate transactions, with important influences on the ability to make funds available for dividends; that as an example of the tactics, false records and effects on dividends in such cases, we may cite the transactions with Mosser Co., a subsidiary; that defendants bought up through other subsidiaries and retained in the treasury over 80% of the Mosser shares. After soliciting the remaining holders including plaintiff, to sell at book value, which was less than 1/3 of the price paid for the shares, defendants forced plaintiff to accept that price by ordering a sale of all assets through their stock control. Plaintiff had received no dividends for 10 years on Mosser, yet the president who is one of the defendants, received a salary of \$43,000.00 per year, plus a bonus of \$30,000.00;

(f) Defendants falsely represented that the net book assets of the company were \$184,084,000.00 as of the time of the plan, when in fact they were \$249,462,000.00; (g) Numerous similar manipulations will be disclosed by an examination of the books to which defendants have denied plaintiff access; that to induce preferred shareholders, including plaintiff, to give proxies, support the plan and exchange their shares, defendants represented that they had no personal interests contrary to preferred, that, in fact, their personal interests were directly adverse because of their preponderant holdings of common shares, as alleged, and because of contracts with the company, through which they made illegal profits contrary to their fiduciary status, including sales of six stockyard properties to one director who gained a profit thereon of \$150,000.00 per unit; that opposition was stifled by giving opponents directorships and paying them for shares in full; that defendants, for their own benefit, used a force of 800 company employees headed by one Arthur Jones to solicit proxies and

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exchanges at company expense and time, paying same with company funds that could be used for dividends; that in some cases they were absent from work for 7 weeks; that the foregoing misleading and fraudulent devices were part of a general scheme designed to misrepresent, falsify and conceal, and to keep preferred shareholders ignorant of their rights and the material facts; that defendants did not inform preferred shareholders of their right to dissent or provide a feasible method for so doing; that the false representations and other inequitable activities aforesaid were carried out by defendants with full knowledge of their falsity and with intent to induce the false beliefs, ignorance and mistakes of old preferred shareholders; that plaintiff and old preferred shareholders relied thereon and in reliance thereon entered into the contract of exchange; that under the terms of plaintiff's corporate contract, the company had no power to adopt the plan and that it was illegal under the laws of the state and the federal and state constitutions, and that because of the activities aforesaid, it was unlawfully adopted; that no assets were added to the company by the plan, that it was merely a rearrangement of book entries accomplishing the same effect as a proceeding under 77B, without the insolvency, publicity, or court supervision therein provided; that the details of the various transactions are peculiarly within the knowledge of defendants and numerous other unlawful activities will be disclosed by an examination of the books and records; that plaintiff has tendered his new preferred and common to defendants and has demanded the return of his old preferred shares but has been refused; that these facts have only recently come to his knowledge, namely after December, 1936, when it was announced in the press that suit had been started by old preferred shareholders to collect accumulations; that the original complaint was filed April 30, 1937. Plaintiff prays that the contract of exchange made by him in ignorance of his rights, be rescinded and cancelled, and that defendants be ordered

to issue to plaintiff the original 7% preferred shares and pay accrued dividends thereon; that judgment be entered against defendants for \$312.50; that defendants be ordered to return to the company any profits they have made directly or indirectly through the plan; that the defendants be ordered to make full and complete discovery of matters within their personal knowledge and under their control and of their associates and confederates, and for general relief.

Defendants filed a motion to dismiss, wherein they asked the court to enter a judgment on behalf of the defendants for the reason that there has been a misjoinder of counts and of plaintiffs, and allege that counts 1 and 2, respectively, are inconsistent and afford no basis for a cause of action, and that no judgment can be given in favor of both plaintiffs in that one plaintiff is the holder of 7% preferred stock and the other is a holder of 8% prior preferred stock; that said complaint shows on its face that the issuance of the new preferred and new common stock therein described was lawful and in accordance with the provisions of the statute in such cases made and provided; that said amended complaint fails to state facts showing wherein said issuance was unlawful; that said complaint fails to state facts showing wherein the plan of recapitalization therein described was illegal or void or without the powers of the company or its stockholders, or in violation of any statute or of the constitution of the State of Illinois or of the United States; - - - that said complaint shows on its face that the plaintiff, Widitz, as a holder of said new preferred and new common voluntarily made the exchange and is bound thereby; that no facts are stated disclosing any misrepresentation, intentional or otherwise, by any of said defendants or any reliance by either plaintiff upon any representation, intentional or otherwise, by any of these defendants; that the facts alleged show on the face of the pleading that each plaintiff has been

guilty of laches and is estopped to maintain his alleged action; that the facts alleged show that each plaintiff ratified the plan of recapitalization by receipt of dividends, continuance as a stockholder, and exercise of the rights of a stockholder according to the status of each under said plan of recapitalization. * * * therefore, the said defendants and each of them moved that said amended complaint and counts 1, 2 and 3 thereof be dismissed and judgment entered on behalf of defendants. On December 28, 1937, the court sustained the motion of defendants to dismiss the amended complaint. Plaintiff elected to stand by count 1 of his complaint, which count has been quoted above, and the same was dismissed, from which decree this appeal has been prosecuted.

Plaintiff filed a motion, supported by suggestions, asking that certain parts of appellees' brief be stricken. Appellees filed countersuggestions and decision on the motion was reserved to hearing. At the same time plaintiff also asked for additional time in which to file a reply brief, which motion was allowed. However, no reply brief was filed. We have thoroughly examined the briefs, abstract and record, and in determining the cause, have disregarded whatever is not in the record. At the outset plaintiff complains that the motion filed by defendants is not adequate to cover the points that are raised on this appeal. A perusal of the motion and defendants' brief satisfies us that the motion was broad enough to fully acquaint plaintiff with the points now urged, which we assume are the same points that were urged before the chancellor on the argument of the motion.

The "plan of recapitalization," a copy of which was attached to the amended complaint, was sent to each stockholder. At that time, there were outstanding 873,313 shares of 7% preferred stock of a par value of \$100.00 per share, 3,000,000 shares Class A common stock of a par value of \$25.00 per share, and 3,000,000 shares Class B common

stock of a par value of \$25.00 per share. Dividends of preferred stock were vested on January 2, 1931, and by May 28, 1934, the accumulations amounted to \$39.50 per share, or an aggregate of about 18 million dollars. The plan offered plaintiff ten shares of 6% convertible prior preferred and twenty shares of new common stock in exchange for his ten shares of 7% preferred and back dividends, which amounted to \$395.00. The plan also provided that Class A stockholders who had a preference over Class B, were offered new common on a share for share basis, and the Class B stockholders were offered one half share of new common for each share of Class B. stock. A section of the plan contained a verbatim copy of the proposed amendments of the articles of incorporation. An examination of the plan discloses that it informed the preferred stockholders that their approval thereof and deposit of their preferred stock, was optional with them. It is not contended that the rights of plaintiff, or of any preferred stockholder, to accrued dividends, could be affected by a vote of a majority of the stockholders. It is clear that the right to the accrued dividends was a vested right, and that any attempt to deprive a shareholder of such right is frowned on by the courts. In the plan, no attempt was made to deprive plaintiff of his accrued dividends, or to force him to surrender his ten shares of preferred stock for ten shares of prior preferred stock and twenty shares of new common stock. Under the plan, the exchange was voluntary. In support of their argument that the plan was legal under the law, defendants cite the case of Sprague v. Illinois River Railroad Co., 19 Ill. 174. A reading of the authorities convinces us that the proposed plan did not contravene any provision of the statutes or deprive plaintiff of any vested right.

We turn to the contention of plaintiff that his amended complaint showed that there was fraud and overreaching by defendants. The

complaint, after setting up the preliminary facts, states that he and "a great majority of old preferred shareholders" believed various things. It does not appear how plaintiff knew that a majority of the preferred shareholders believed as he believed. This is not a class action. Plaintiff also states that he and a majority of the preferred shareholders would not have exchanged their shares had they known the true situation. It does not appear as to how plaintiff knew that a majority of the shareholders would not have exchanged their shares. The complaint then continues with the allegations showing the power of the defendants who were directors and officers. The corporation is a large one, with subsidiaries and affiliates. Undoubtedly, in any large corporation, there is opportunity for wrongdoing. The fact that the officers and directors have the power to do wrong does not give the plaintiff the right to maintain his complaint. Fraud is never presumed; it must be pleaded and proved. Fraud cannot be alleged by general statements or by allegations by way of conclusions. The exhibits which are attached to the complaint certainly do not show any misrepresentation. If defendants made misrepresentations in writing, the specific allegations should be made, setting up the written statements with the approximate date when such statements were made. If the misrepresentations were oral, then there should be proper allegations as to such oral misrepresentations. We agree with defendants that the complaint does not set up facts showing fraud.

Another criticism leveled at the complaint is that it was barred by laches. Plaintiff exchanged his stock in 1934 and received ten shares of prior preferred stock and twenty shares of common stock. He alleges that in December, 1936, he read in the press a statement that suit had been started by old preferred shareholders to collect accumulated dividends, and that he then acquired the

knowledge of the facts set up in the amended complaint. The amended complaint was filed on August 27, 1937. He knew that the plan had been put into effect in 1934, and that the rights of all stockholders were materially affected by the adoption of the plan, yet, according to his own allegation, he waited from December, 1936, until August, 1937, before filing his amended complaint. The original complaint was not included in the record, hence, we are unable to say what it contained. We cannot, however, hold that on the face of the amended complaint, plaintiff was guilty of laches.

For the reasons stated, we are impelled to the view that the action of the chancellor in sustaining the action to dismiss was proper. Therefore, the decree of the Superior Court of Cook County is affirmed.

DECREE AFFIRMED.

DENIS E. SULLIVAN, P.J. AND HEBEL, J. CONCUR.

Knowledge of the fact that in the morning, the morning
 something was killed on August 17, 1934. He knew that the thing was
 seen but this effect in 1934, and that the thing of all possibilities
 were necessarily limited by the condition of the time, with something
 to his own satisfaction, he could have known, and he could
 have been killed in the morning, because he was known to my wife
 is certain, he cannot, however, hold that on the basis of the
 cannot completely, possibly was likely to be so.
 for the reason stated, he is inclined to the view that the
 action of the government in obtaining the matter in question was
 proper. However, the fact of the government's action of such a nature

is a fact.

WILLIAM J. BROWN

WILLIAM J. BROWN, A. B. 1934, A. M. 1935

40314

WAGON-MONTAGUE COAL COMPANY, INC.,
a corporation,

Appellant,

v.

INDEMNITY INSURANCE COMPANY OF NORTH
AMERICA, a corporation,

Appellee.

LOCAL 1302

MUNICIPAL COURT

299 I.A. 619

OF CHICAGO.

43 A

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

Plaintiff, a corporation, is engaged in the retail coal business in Chicago. Defendant, an insurance company, insured plaintiff's trucks for a period of one year beginning July 13, 1931, under what was known as a public liability policy. On November 3, 1931, defendant, through its agent, gave written notice to plaintiff of cancellation of the policy, such cancellation to become effective on November 6, 1931, at 12:01 A. M. The reason asserted by the insurance company for the cancellation of the policy was that the premium had not been paid. Plaintiff insisted that it paid the premium to the Plummer Realtors Corporation, a corporation, on August 11, 1931, and that the latter corporation was the agent of the insurance company. Therefore, plaintiff argues that the premium was actually paid to defendant. The controversy arose because the Plummer Realtors Corporation failed to transmit the premium to the insurance company. In the cancellation notice, the insurance company took the position that inasmuch as the premium had never been paid to it, there was no obligation to return any so-called unearned premium. Plaintiff at all times maintained that the premium was paid to defendant and that the insurance policy was in effect despite the notice of cancellation. Plaintiff also insists that the attempted cancellation was ineffective because defendant did not tender the unearned premium. After the attempted cancellation, and on November 25, 1931, one of plaintiff's trucks collided with a

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street car and the driver was arrested. A report of the collision was given to Bartholomay - Darling Company. It is conceded that the latter company was the duly authorized agent of the insurance company. On November 27, 1931, the general agent wrote plaintiff stating that its records indicated that the policy had been cancelled as of November 8, 1931. On November 30, 1931, plaintiff wrote the general agent that it would investigate and defend any suits against it, and would expect the insurance company to indemnify it against any loss, judgments, claims, attorney's fees or costs and expenses. Plaintiff's driver involved in the accident, was discharged in the criminal or quasi criminal case in the Municipal Court of Chicago. Thereafter, two minor accidents occurred, one on December 4, 1931, in which the damage was \$11.20, and one where the damage amounted to \$12.00. Both claims were settled. Both accidents were duly reported to defendant, who replied in the same tone as it did to the notice of the first accident. On January 18, 1932, plaintiff wrote to defendant, discussed the accidents that had occurred, and stated: "We do hereby cancel said contract as of the date of this letter". The letter also again informed defendant that plaintiff would expect defendant to make good all losses sustained, whether the claims had been paid, or should be paid in the future. It concluded by stating that the unearned premium was \$361.56, and that the expenses incurred up to that time by reason of defendant's refusal to carry out the provisions of the policy, amounted to \$94.20, and accordingly demanded a remittance for the total sum of \$455.76.

In chronological order, the next step was a claim asserted by Willard Richardson, a minor, for personal injuries growing out of the collision of November 25, 1931. Again plaintiff notified defendant. An action was commenced by the minor in the Superior Court of Cook County against the Chicago Surface Lines and plaintiff. In that action, the minor, Willard Richardson, claimed damages of \$25,000.00. The

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summons served on plaintiff was forwarded to defendant's general agent. Defendant again replied that the policy had been cancelled and declined to defend the case. Plaintiff thereupon employed an attorney who investigated the accident, caused photographs to be taken and filed a plea. This attorney performed all other necessary services in connection with the preparation of the case. When the case was reached for trial, and after a jury had been impaneled and the opening statements made, a settlement was effected for the sum of \$1,900.00, of which plaintiff paid \$950.00. Plaintiff also paid to his attorney the sum of \$350.00, which was a reasonable fee for the services rendered. On June 3, 1932, plaintiff filed its statement of claim in the Municipal Court of Chicago and sought to recover from defendant what it asserted was an unearned premium amounting to \$526.23, and in addition, the sum of \$26.20 for settling the minor damage cases, \$50.00 paid to plaintiff's attorney for appearing in the police court at the time the driver was on trial, \$10.00 for cost of photographs, and \$3.00 paid to a reporter for taking testimony. A motion to strike the claim was sustained. On leave granted, plaintiff filed an amended statement of claim. Defendant filed an affidavit of merits and a set-off. The set-off sought to recover from plaintiff what it termed the earned premium covering the period from July 12, 1931, to November 8, 1931. Plaintiff filed an affidavit of merits to the set-off. On June 15, 1934, plaintiff commenced another action in the Municipal Court of Chicago. The second action, designated in that court as of the first class, was grounded on the same insurance policy. It asserted that on November 25, 1931, (which was after the attempted cancellation by defendant and before the attempted cancellation by plaintiff) one of the trucks insured under the policy collided with a street car of the Surface Lines, and that plaintiff reported the accident to defendant, who declined to defend the case, and that Willard Richard-

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son, a minor, was a passenger on the street car, being injured in the accident; that the minor by his next friend sued the receivers of the Chicago Surface Lines and plaintiff, claiming damages in the sum of \$15,000.00; that plaintiff was served with a summons and requested defendant to defend the case, which defendant declined to do; that plaintiff employed an attorney, and that the case was settled for \$1,900.00, of which plaintiff paid \$950.00; that in addition to its portion of the settlement, plaintiff also paid expenses, attorney's fees and costs, which aggregated the total sum of \$1,342.15. Plaintiff asked judgment against defendant for that amount. Defendant filed an affidavit of defense, a jury trial was waived, and the two cases were consolidated and tried together. In the trial of the consolidated cases before the court without a jury, the court found the issues against the plaintiff and in favor of the defendant, and assessed the damages of the defendant in its set-off at the sum of \$411.38. The court overruled a motion for a new trial and entered judgment on the finding, to reverse which plaintiff prosecutes this appeal.

A great deal of the evidence is in the form of records, letters, notices, policies and other documents. For many years plaintiff had been engaged in the retail coal business at 6876 South Chicago Avenue in Chicago. Among its customers were certain managers of real estate offices who handled insurance as a part of their business. To retain their coal business, prior to 1930, plaintiff purchased its insurance from these real estate managers. One of the real estate managers who was a customer of plaintiff, was W. T. Blummer. Bartholomew-Darling Company was a general insurance broker. A coal mining company, which apparently was an affiliate of plaintiff, was on friendly terms with the insurance broker and thereby the parties became acquainted. On February 15, 1930, plaintiff made inquiry of the

insurance broker concerning insurance rates. The broker offered to make a complete survey of its insurance. On February 26, 1930, plaintiff wrote the insurance broker as follows:

"Replying to your letter of February 17th, which was in reply to ours of the 15th: we would be glad to have you advise us before taking your time to make a trip out here, the basis on which you work.

"You understand, our insurance is given out on a reciprocal plan. In other words, we are compelled to turn our insurance over to those who give us their coal business. With this in mind, we would be glad to have you advise us on just what basis you would be in position to handle it for us.

"A prompt reply will be appreciated, after the receipt of which we will be glad to give you further details."

On March 7, 1930, the insurance broker replied as follows:

"Replying to your communication of February 26th, relative to your insurance, we wish to advise that the only basis on which we do business is one of service to our clients. We are not in a position to obtain new customers for you and we have not worked on that basis in the past.

"Our dealings with the Wesson Coal Company are strictly that of service to them in cutting down insurance costs, and we believe in the long run that this will be of benefit to them. It may be possible that we could work out some way of serving you in such a manner that you would not lose any of the business which comes to you on account of reciprocity.

"As you no doubt know, we obtained a reduction in rate on your yard after making an analysis at the suggestion of Mr. L. A. Wesson and will be very pleased to go into the matter again if you will so advise."

Plaintiff wrote another letter to this broker on March 13, 1930, stating that plaintiff would be glad to go into the matter of its insurance with a view to securing a further reduction. On June 17, 1930, the insurance broker wrote plaintiff as follows:

"We are enclosing herewith a report covering your insurance in detail, also insurance policies which we have had in this office for examination.

"When you have had an opportunity to go over this report, we would like very much to call on you regarding ways and means of saving the Wesson-Pocahontas Coal Company money in their insurance cost, and at the same time favoring the agents who are now placing the business."

On July 1, 1930, the insurance broker wrote Plummer, in part, as follows:

"Mr. Wesson has instructed that we write this insurance, however, because of the pleasant relations that have existed

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between your office and the Masson-Pocahontas Coal Company, we suggested, and Mr. Masson approved, that you continue to act as broker on this business. In doing this your office will obtain the regular brokerage commission and we will have served the Masson-Pocahontas Coal Company, which we have endeavored to accomplish. We will call on you very soon regarding this matter."

Shortly after the above letter was written to Plummer, Mr. Butler, an employee of the insurance broker, called on Plummer at his place of business and discussed the policy of insurance to be written on plaintiff's trucks as of July 13, 1931. On July 10, 1930, Mr. Butler, on behalf of Bartholomay - Darling Company, wrote Plummer, as follows:

"With reference to our conversation relative to the Masson-Pocahontas Coal Company liability and property damage insurance on seven trucks and three pleasure cars for \$25/30,000 limits on liability, and \$10,000 limit on property damage, we wish to advise that on a commercial pay roll basis the cost will be \$991.61. This will also cover automatically any hired automobiles, their hired cars to be charged at a rate of \$1.75 per hundred dollars cost of hire. Will you please submit this to the Masson-Pocahontas Coal Company, along with any other figures which you may have obtained. If we can serve you in any other manner, please feel free to call on us."

Other letters were written, and on April 23, 1931, plaintiff wrote the insurance broker, as follows:

"Under date of April 14th, we purchased a new Chevrolet coupe at a cost of \$614.00 - Serial No. 14E 234030 - Engine #348632.

"Will you kindly have this car covered for fire & theft under our fleet policy #P5 #33615, Philadelphia Fire & Marine Ins. Co., written thru Sutton & Peterson. Also have it covered for Public Liability and Property Damage, our fleet policy #141 17138, Public Indemnity Co., written thru Plummer & Sultors.

"Kindly have insurance effective immediately.

"Thanking you for your prompt attention to this matter, we are."

On May 5, 1931, plaintiff again wrote the insurance broker, stating that he had not heard from him that the insurance was placed as requested in his letter of April 23, 1931. On May 7, 1931, the insurance broker replied as follows:

"With reference to your inquiry of May 5th, we wish to advise that the endorsements taking care of coverage on the new Chevrolet Coupe were forwarded to Plummer & Sultors and Sutton & Peterson on May 5th, and are no doubt in your hands by this time. If not, kindly advise and we will issue duplicates."

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1. The first part of the document is a letter from the author to the reader, dated 1954. It is a personal letter, and the author is writing to the reader about the book. The author is a man, and the reader is a woman. The author is writing to the reader about the book, and the reader is writing to the author about the book. The author is writing to the reader about the book, and the reader is writing to the author about the book.

On 10/10/1968, the defendant was found dead after having been shot and killed.

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED EXCEPT WHERE SHOWN OTHERWISE

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The court received in evidence the automobile liability policy written by defendants covering the period from July 12, 1931, to July 12, 1932. On July 6, 1931, the insurance broker wrote plaintiff as follows:

"We acknowledge receipt of your letter of July second, enclosing expiration notices received from your brokers in connection with your automobile insurance. As you know, we are arranging for the renewal of this insurance; it, of course, will be credited to the account of the same Agencies, as you requested."

The court received in evidence as an exhibit, an invoice on the letterhead of Bartholomay - Darling Company. The invoice gives the date of the policy, the number, the name of the insurance company, the property insured, the amount and the premium charged. On the left hand side appears the word "Assured", followed by the name Wason-Pocahontas Coal Company, and to the right hand side appears "Acc't of Michael T. Plummer, Address 7747 South Halsted Street". Below the name of the assured appears the date of expiration, July 12, 1932. The invoice also contains a printed legend in red ink, which reads as follows: "Make all checks payable to Bartholomay-Darling Company." The court admitted another exhibit similar to the one last mentioned, for an additional premium of \$29.64. The invoices were mailed to M. T. Plummer. There is testimony that he in turn made out invoices on his own letterhead and delivered them to plaintiff. One of plaintiff's witnesses testified that Plummer brought over to plaintiff's office the original invoice issued by Bartholomay-Darling Company. Later, the witness stated that he misunderstood the question, and that what he intended to say was that Plummer brought to the office of plaintiff the invoices made out by Plummer on the latter's letterheads. Plaintiff delivered its check dated September 17, 1930, payable to the order of Plummer Realtors Corporation in the sum of \$391.61. The check, received in evidence, bears the

The first property of the system is that it is a closed system. This means that the system is not open to the environment and therefore it is not possible for information to enter or leave the system. This is a very important property because it ensures that the system is self-contained and that the information within it is not affected by external factors.

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The second property of the system is that it is a dynamic system. This means that the system is not static and that it is capable of changing over time. This is a very important property because it ensures that the system is able to adapt to changing conditions and that it is not frozen in time.

The third property of the system is that it is a complex system. This means that the system is not simple and that it is composed of many interacting parts. This is a very important property because it ensures that the system is able to perform a wide range of functions and that it is not limited to a single task.

The fourth property of the system is that it is a distributed system. This means that the system is not centralized and that the information is distributed across many nodes. This is a very important property because it ensures that the system is able to handle a large amount of information and that it is not bottlenecked by a single point of failure.

The fifth property of the system is that it is a self-organizing system. This means that the system is able to organize itself into a functional structure without the need for external intervention. This is a very important property because it ensures that the system is able to adapt to changing conditions and that it is not dependent on external control.

The sixth property of the system is that it is a resilient system. This means that the system is able to withstand disturbances and that it is able to recover from failures. This is a very important property because it ensures that the system is able to maintain its functionality in the face of adversity.

The seventh property of the system is that it is a scalable system. This means that the system is able to handle an increasing amount of information and that it is able to grow in size without losing its functionality. This is a very important property because it ensures that the system is able to meet the needs of a growing organization.

The eighth property of the system is that it is a secure system. This means that the system is able to protect its information from unauthorized access and that it is able to maintain its integrity. This is a very important property because it ensures that the system is able to handle sensitive information and that it is not vulnerable to attacks.

The ninth property of the system is that it is a flexible system. This means that the system is able to adapt to changing requirements and that it is able to perform a wide range of tasks. This is a very important property because it ensures that the system is able to meet the needs of a dynamic environment.

The tenth property of the system is that it is a reliable system. This means that the system is able to perform its functions consistently and that it is able to maintain its performance over time. This is a very important property because it ensures that the system is able to be trusted and that it is not prone to errors.

endorsement of the payee and the bank stamp showing it was paid on September 30, 1930. During the month of September, 1931, Mr. Butler talked with Mr. Nance of the plaintiff company and was informed that plaintiff had paid Plummer the amount of the insurance premium. Nance testified that Butler said: "Well, O.K. We will get busy and try to get our money from Plummer." Thereafter, a conference was arranged at the office of the insurance broker, which was attended by Nance, Plummer, a Mr. Clarkson of the insurance broker's office and a Miss Sissie. Clarkson told Plummer he had committed a serious offense in that he had collected the money for the insurance premium and had not paid the company, and that he had better go home and see what he could do. Subsequent to the conference and on October 7, 1931, Plummer brought to the insurance broker 10 shares of bank stock and took a receipt reading as follows: "Received from M. F. Plummer, for Plummer's Realtors Corporation, 10 shares of Standard National Bank stock, certificate No. 845; and it is understood by and between M. F. Plummer and Bartholomay-Darling Company that said stock is being deposited by him with us as collateral security only for his indebtedness, and not as payment thereof." Undoubtedly, the arrangement made was of mutual advantage to the parties.

The trial court found that:

"The plaintiff entered into its course of business dealings with Bartholomay-Darling Co., defendant's agent, by reason of the inducement held out by Bartholomay-Darling Co. (1) that it would give plaintiff a more efficient and economical handling of its insurance; and (2) that plaintiff's real estate manager customers would continue to be credited with and to receive the same commissions they had received before on the insurance premiums, and would continue to have the same inducement to give plaintiff their respective coal orders."

Defendant argues that the trial court had the right to believe the testimony that the invoices from Bartholomay-Darling Company were delivered by Plummer to plaintiff, and also urges that the plaintiff was bound to take notice of the legend on the invoice that checks should be made payable to Bartholomay-Darling Company. Plaintiff

repels these contentions by asserting that the statement of his witness was caused by a misunderstanding of the question, which he corrected before he left the stand, and that the late warning debtors that premiums be paid to Bartholomay-Darling Company was, in fact, directed to Plummer. The parties also draw different conclusions from the invoices, plaintiff insisting that the invoices show that the insurance broker considered that the debtor was W. T. Plummer, and the defendant asserting that the invoices show that the debtor was the assured. Bartholomay-Darling Company was undoubtedly anxious to procure the insurance business of plaintiff. Plaintiff was anxious to remain in the good graces of the various real estate agents in order to have their good will in the sale of coal. If it were not for the desire of plaintiff to deal through the various real estate brokers, the insurance could have been placed directly with Bartholomay-Darling Company. It is significant that on July 2, 1931, plaintiff wrote Bartholomay-Darling Company as follows: "The attached notices of the expiration of several policies have been received by us. Will you kindly see the renewals are made and sent through the same agencies." On July 6, 1931, Bartholomay-Darling Company wrote plaintiff acknowledging the letter of July 2, 1931, and the expiration of the notices, stating "As you know, we are arranging for the renewal of this insurance; it, of course, will be credited to the account of the same agencies, as you requested".

In a second conference in the office of Bartholomay-Darling Company, Mr. Darling told the participants "there will be no halfway route in this case, the only thing is we want our money", and "there is no way to straighten it out other than to see that we get paid". Plaintiff maintains that the testimony as to the conferences in the office of Bartholomay-Darling Company and the receipt by that corporation of the shares of bank stock, is strong evidence that

the insurance company recognized Plummer as its agent. At that time, the general insurance broker was endeavoring to collect the premium, and at the same time, endeavoring to maintain good relations with all parties. The fact that Bartholomew-Jarling Company made an effort to collect from Plummer does not necessarily establish the fact that they were recognizing him as their agent. At that time, their position was well understood by plaintiff. If, by the conferences, the parties could prevail upon Plummer to raise the amount necessary to pay the premium, the matter would be disposed of to the satisfaction of all parties.

As suggested by plaintiff, we have thoroughly examined the exhibits and the testimony in order to determine whether the finding of the trial court was against the manifest weight of the evidence. The record discloses that there is abundant evidence to sustain the finding of the court that Plummer was the agent of plaintiff and not of defendant. As the premium was not paid, defendant had an undoubted right to cancel the policy. Notice was given on November 3, 1931, that the policy would terminate at 12:01 A. M. on November 8, 1931. Plaintiff was afforded ample opportunity to procure other policies in order to protect itself against claims. Having determined that the premium was not paid to defendant, the court was right in finding that defendant was within its rights in cancelling the policy, and that plaintiff was indebted to defendant for that portion of the premium covering the period from July 13, 1931, to November 8, 1931.

We have considered the other points raised and argued by the parties, but in view of the finding made on the proposition of agency, there is no need of extending this opinion by a discussion of such other points. Because of the views expressed, the judgment of the Municipal Court of Chicago should be and it is affirmed.

JUDGMENT AFFIRMED.

DENIS E. SULLIVAN, P.J. AND NEBEL, J. CONCUR.

40481

THOMAS BROWN, MILTON TURNER and
WILLIAM MASON,

Appellants,

v.

GUY A. RICHARDSON and WALTER J. DUBOIS,
as Receivers of the Chicago Railways Co.,
a Corp., et al., doing business as
CHICAGO SURFACE LINES,

Appellees.

APPEAL FROM

CIRCUIT COURT

299 T.A. 618

COOK COUNTY.

44/A

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

This is an appeal prosecuted by plaintiffs from a judgment entered in the Circuit Court of Cook County, following the trial of a personal injury action, wherein the court directed a verdict in favor of defendants. There is no substantial dispute as to the proposition of law that in considering the motion for a directed verdict, it was the duty of the court to consider all of the evidence in its aspect most favorable to the plaintiffs, together with all reasonable inferences arising therefrom. Therefore, we have carefully examined the record in order to determine whether the court was justified in taking the case from the jury.

At about 8 A. M. on August 19, 1937, plaintiff Thomas Brown, accompanied by plaintiff Milton Turner who occupied the front seat alongside of him, was driving the 1933 model Nash four-door sedan of plaintiff William Mason, who was not then in the car, in an easterly direction on Lake Street in Chicago. Lake Street is an east and west highway. Above that street is an elevated railroad, supported by steel posts. Sangamon Street runs in a northerly and southerly direction and intersects Lake Street. Defendants operate trolley cars running on steel rails on both streets. Plaintiffs Brown and Turner sought damages because of personal injuries, and plaintiff Mason asked for damages to his automobile. Brown had permission from Mason to drive the latter's automobile.

Thomas Brown testified that he left his home, located about 15 blocks from the place where the accident occurred, at about 8 A.M. on August 19, 1937, and drove east on Lake Street, traveling in the eastbound street car tracks at an average speed of 15 miles per hour. He stated that on approaching Sangamon Street, he was driving from 8 to 9 miles an hour; that directly in front of him was an automobile and a truck; that the truck crossed the intersection of Lake and Sangamon Streets, and that the automobile ahead of him was going across the intersection at the time the witness's automobile reached the west curb of Sangamon Street; that he brought his automobile to a complete stop at the west curb of Sangamon Street; that he looked south on Sangamon Street and observed no traffic moving north thereon, and that he looked north and saw a street car facing south and standing at the northwest corner of Sangamon and Lake Streets, and that some passengers were getting on and off the street car; that he did not see the street car when it started up, and that he was watching the traffic in front of him; that he shifted his gears into first speed and then into second speed and proceeded to cross the intersection, going east on the east bound tracks of Lake Street; that when the front wheels of his automobile were in the northbound tracks of Sangamon Street, he heard a crash; that his automobile landed against an elevated post located at the southeast corner of the intersection; that he was bleeding from his head and had a pain in his shoulder and back and that Turner helped him get out of the automobile; that they went to the northwest corner and hailed a passing motorist, who took them to the office of a physician at 1380 West Lake Street. Witness then testified as to treatment by the physician and stated that he was confined to a hospital until September 6, 1937, and to his home for two months thereafter, and that he was unable to work on account of having fainting spells. On cross-examination, witness testified that he had driven automobiles for 25 years, and was

[illegible]

thoroughly familiar with the intersection where the accident occurred; that he knew that a street car line was operated on Sangamon Street; that he estimated that the distance from the west curb of Sangamon Street to the east rail of the southbound tracks thereon was 15 feet; that his automobile was going 5 to 6 miles an hour when struck; that he did not see the street car start south on Sangamon Street after he had started to cross the intersection; that he did not know how fast the street car was going; that the left rear end of his automobile was struck by the left front of the street car; that the pavement was dry that morning and that his four wheel brakes were in good condition. He further stated that on a dry pavement he could stop the automobile in 10 or 15 feet, and maybe in a shorter distance.

Milton Turner testified that he was sitting alongside of Brown; that they were both on their way to work at the time; that when the automobile was 100 feet west of Sangamon Street, it was traveling about 8 miles an hour, and that they were following a car and a truck which had been in front of them from Ogden Avenue to Sangamon Street; that when the automobile in which the witness was riding came to the west curb of Sangamon Street, it slowed down to 4 or 5 miles an hour; that he looked south and saw no traffic coming north on Sangamon Street, and that he looked north on Sangamon Street and saw a street car standing on the northwest corner and that he saw passengers getting on and off the street car; that he then continued from the west curb of Sangamon Street to cross the intersection and I didn't pay any more attention to the street car until I heard it hit the automobile. When the front wheels of the automobile were in the northbound tracks of Sangamon Street, it was struck by the street car. The left front side of the street car struck the left rear wheel and fender of the automobile. After the impact, the automobile was thrown against an elevated pole on the southeast corner of Sangamon

and Lake Streets. The automobile landed on its right side. After the impact, the street car stopped 30 feet south of the center of the intersection. My face and left hand were cut up and I helped Brown get out from the wrecked car." He then testified as to visiting the doctor. While at the doctor's office, two policemen who had heard of the accident, arrived and took him to the scene of the accident. The street car had departed, and the witness and the policemen waited for a few minutes until the street car came north on its return trip. The policemen examined the street car and the automobile and made out an accident report. On cross-examination, this witness testified that when the automobile was 100 feet west of Sangamon Street, it was going 8 miles an hour; that the distance from the west curb of Sangamon Street to the west rail of the southbound tracks is "about 10 or 15 feet"; that the distance from the north building line of Lake Street to the north rail of the westbound track "would be practically the same distance as from the sidewalk line to the track on Sangamon Street." He further testified on cross-examination that after starting across the intersection from the west curb of Sangamon Street, he did not see the street car start south on Sangamon Street; that prior to the morning of the accident, he had been driving an automobile for about 8 years, and had frequently driven the automobile in which they were riding. He stated that on a dry street traveling 8 to 9 miles an hour, he could stop a 1922 Nash with four wheel brakes, in 8 feet; that he was familiar with the intersection, and that he was not paying very much attention to what Brown was doing in the way of driving; that when he saw the street car for the first time, the automobile was at the sidewalk on the west side of Sangamon Street, and that he had not seen the street car until that time, and that he did not notice whether the street car was standing there "when we were back quite a distance."

and later however. The automobile landed on its right side. After
the impact, the driver was thrown 10 feet away to the south of
the intersection. By 1900 and 1910 I think
from the fact that the witness said: "He then testified as he testified
the doctor, while at the doctor's office, was talking and was
heard of the accident, however and that he was at the scene of the
accident. The driver was not injured, but was thrown out of the vehicle
and called for a few minutes until the driver was brought back to the
factory side. The witness testified that driver was not injured
and was not in serious trouble. On cross-examination, this witness
testified that when the automobile was hit that it was
thrust, it was going 5 miles an hour; that the driver from the west
side of Thompson Street to the west side of the intersection, where it
"about 10 or 15 feet; that the witness from the south testified
that it was thrust to the north side of the intersection about 10 feet
to practically the same distance to the south side of the
street on Thompson Street. The witness testified on cross-examination
that after stating before the investigation from the west side of
Thompson Street, he did not see the driver and driver about 10
feet from the intersection; that when he saw the driver, he had
been driving an automobile for about 5 years, and had previously driven
one automobile in which they were riding. He stated that on a day
about November 3 or 4 miles an hour, he was on a 1910 Ford
with four wheel brakes, in 5 feet; that he was familiar with the
intersection, and that he was not paying very much attention to what
was going on the way at driving; that when he saw the driver
get from the first time, the automobile was on the side of the road
side of Thompson Street, and that he had not seen the driver for some
time, and he did not know whether the driver was on
standing there when he came back with a witness."

William Mason testified that he owned the automobile that was involved in the accident; that the three plaintiffs worked in the same vicinity, and that on the morning of the accident, he did not need to be at work until 9 A.M., and for that reason took a street car to his place of employment; that on the way to work, he saw his automobile turned over against an elevated post at the southeast corner of Sangamon and Lake Streets. He testified that the brakes were in good condition, and that prior to August 19, 1937, his car was "in perfect condition". On cross-examination, he stated that he did not have a safety sticker on the car.

C. Mousle testified that he was a police officer for the City of Chicago, assigned to the Desplaines Street Station; that at about 8:15 on the morning in question, he received a call to investigate an accident, and that he and his partner, Officer Smith, went to the scene and observed the automobile as it lay alongside of an elevated post on the southeast corner of Sangamon and Lake Streets; that they then proceeded to the doctor's office and returned with the plaintiff Turner to the scene of the accident, where he interviewed the motorman of the street car on his return trip; that the motorman stated that the automobile "was going 50 miles an hour or more and cut him off"; that the witness then stated that he did not think the automobile could go that fast; that he examined the street car and saw a dent on the front left hand side of the street car, which was in the rear at the time; that it was not a very large dent and one could tell that there had been an impact; that there was some black paint on the dent and that there were no other marks on the street car, and that he examined the automobile and "saw the left rear wheel and fender was dented".

R. Smith, a police officer assigned to the Desplaines Street Station corroborated the testimony of his partner.

Henry Martin testified that he was employed at an establishment about 25 or 30 feet east of the southeast corner of Sangamon and Lake Streets; that about 8:05 A. M. on the day of the accident, the witness was waiting for a truck to come in with a shipment, and that he was standing on the sidewalk in front of the place, looking northwest; that "there was a bunch of traffic going by", and that he paid no attention to the traffic; that all of a sudden he heard a crash and noticed a street car; that "I noticed a bunch of traffic, a truck and car and then I noticed another car behind this first car get hit by the street car and I went over there. The street car was going south. It was a one-man street car. I didn't see the operator of the street car until the crash". Upon being asked whether he noticed the automobile before the impact, he stated: "why, I noticed part of it. I didn't pay much attention to anything at the moment, but I noticed that the front of the automobile was going across the north and southbound tracks." He further stated that the automobile was struck when its front wheels were in the northbound tracks of Sangamon Street and that the rear of it was in the southbound tracks; that he saw the street car hit the automobile, and that the automobile was thrown off the track and hit a post and tipped over; that it was thrown in a kind of angle sideways and landed up against a pillar over on the southeast corner of Sangamon and Lake Streets; that the automobile turned over twice and landed on the right side with its front facing east and its rear west. He stated that there was a lot of traffic going east on Lake Street that hour of the morning; that when he first saw the automobile, it was just about coming into Sangamon Street, and that the front wheels were just about entering the southbound tracks, and that at that time, the street car was standing still; that when the front wheels of the automobile were in the southbound rails on Sangamon Street, the street car was

parked, and that he did not notice any passengers getting on or off. He further testified that "just before the impact or crash, I did not hear any sounds of gongs or warning given by the operator of the street car, and that the street car stopped when he crossed the east and westbound tracks. He crossed them and stopped. He pulled the car away. After the street car hit the car, the street car stopped about one length south of the eastbound tracks. About the east part - the front end of the street car struck the automobile". On cross-examination he testified that he had been driving an automobile since he was 15 years of age; that the automobile involved in the accident was traveling "a couple of miles an hour when it was struck", and that cars were parked along the south curb of Lake Street at the time of the accident. He acknowledged his signature to a statement made by him to an investigator for defendants on September 11, 1937. He stated that he did not remember whether he told the investigator that he couldn't give any information as to the speed of the street car, that perhaps he did make the statement, but he did not remember it; that he did not remember whether he said the street car ran about 10 feet after the accident; that he did not remember that he said the automobile moved to the right to avoid a collision; that he did not remember whether he stated that the automobile was going between 15 and 30 miles an hour, and stated, "maybe I did and maybe I didn't make that statement". He testified that he has had occasion to stop automobiles with four wheel brakes traveling at speeds of from 15 to 40 miles an hour, and that he could stop a 1939 four door Nash, equipped with four wheel brakes, on a dry street traveling at from 4 to 6 miles an hour, in "a couple of feet".

Stanley Spejcher testified that he was a commercial photographer. By means of his testimony, two photographs of the automobile lying on its side against the elevated foot on the southeast corner of Sangamon and Lake Streets, were introduced in evidence.

Henry Posnecki, a boy, who, at the time of the trial, was 13 years old, testified that at 8 o'clock of the morning in question, he was helping his mother in a tavern at Peoria and Lake Streets; that he was on his way to cash a large bill at a tavern located at the northwest corner of Sangamon and Lake Streets; that he walked west on the north side of Lake Street, and that when he reached the northeast corner of Lake and Sangamon Streets he saw a street car parked on the northwest corner facing south; that he was waiting for the street car to go in order to cross and that he was watching the conductor, that the conductor was taking fares and giving transfers out. He stated that "then after a while I was just going to cross, then I heard a crash and I looked and the street car hit the left rear wheel and rear fender and knocked the car over twice against a post and rolled back. The street car moved up to the corner, then he stopped and waited for the policemen and the policemen checked up." On cross-examination, he stated that he was at the corner all together before the accident and after the accident about 15 minutes; that when he came to the corner he saw the street car standing there and facing south, and that about 10 minutes after the accident, he saw three policemen arrive. This witness recognized his signature to a statement that he gave on September 14, 1937. On the trial, counsel interrogated him as to whether the investigator asked him if the street car was standing or moving, and if it was moving, how fast. The witness answered: "I do not know how fast it was going". He testified that he did not tell the investigator that the motorman sounded his gong; that he did not tell the investigator that the eastbound automobile moved to the right to avoid hitting the street car; that he couldn't see; that he did not tell the investigator that the front left of the car struck the right rear of the auto, and that he did not tell the investigator that the street car hit the left side of the automobile.

[illegible]

George Skala testified that at about 8 o'clock of the morning in question, he was standing on the sidewalk outside of the plant of the Refrigerator Appliance Company, on the east side of Sangamon Street and about 25 to 30 feet south of the southeast corner of Lake and Sangamon Streets; that he was looking north on Sangamon Street and west on Lake Street; that he saw a one-man street car stop at the northwest corner of Sangamon and Lake Streets, and that some passengers were getting on and off; that there was a Nash Sedan going east on Lake Street; that when he first saw the automobile, it was just south of the west street car line on Sangamon Street, and that the automobile was going about 4 to 6 miles an hour. He stated that "the auto was just about commencing to get into the southbound rails. When the front wheels of the automobile were in the southbound tracks, the street car started. I heard no signal or gong sounded by the operator of the street car at the time it started to go south on Sangamon Street, or before the impact. At the time of the impact, the street car was moving about 8 to 12 miles an hour. The left side of the street car struck the left rear fender and wheel of the automobile, turning it over twice, and it landed against an elevated pole located at the southeast corner of Sangamon and Lake Streets. The front wheels of the automobile were on the northbound tracks of Sangamon Street, and the rear wheels were on the southbound tracks of Sangamon Street at the time of the collision. The automobile is about 10 to 12 feet long. At the time the street car started, I saw the operator of the street car hand out transfers and collect fares. The operator was not watching traffic going east on Lake Street at the time the street car started." On cross-examination, he testified that the front of the street car was about 2 or 3 feet south of the building line at the crosswalk of Lake Street when it was standing; that he saw some people getting on the street car and some getting off, and that in his opinion the automobile was going from 4 to 6 miles an hour.

[illegible]

across the intersection. He stated that he had driven automobiles for 23 years, and that he had experience in stopping automobiles at speeds up to 45 and 50 miles an hour, and that in his opinion a 1929 Nash with four wheel brakes in good condition, being operated on a dry pavement at 4 to 6 miles an hour, could be stopped in from 1 to 3 feet, and that if it was equipped with two wheel brakes, it could be stopped in 6 to 10 feet.

A physician testified as to his services and the reasonableness of his charges and the charges of the hospital. At this juncture, the plaintiff rested.

The defendants placed on the stand the motorman and seven persons who were passengers on the street car at the time of the accident. The substance of their testimony was that they observed the automobile traveling east on Lake Street at a speed of around 50 miles an hour; that the automobile was from 50 to 100 feet west of Sangamon Street at the time the motorman of the street car started to cross the intersection, and that the motorman stopped the car quickly; that the driver of the automobile tried to swing out of the way of the street car, and that the automobile "flew across to the elevated post"; that the operator of the street car then drove the street car across the intersection in order to get it out of the way of traffic, and that the operator of the street car was not collecting fares at the time of the crash.

George Gersch, the operator of the street car, testified that he was 47 years of age, and that he had been employed as a motorman for 25 years; that when he stopped the car at the northwest corner of Sangamon and Lake Streets, a woman got off and another person got on; that he closed the doors of the car, looked east and west but he could not see far because of the building on the northwest corner; that he started the car and moved about 3 feet when he saw an automobile

around the investigation. He stated that he had driven automobiles for 25 years, and that he had experience in driving automobiles at speeds of 40 to 50 miles an hour, and that he had driven a 1925 Buick with four-door coupe in New York City, being operated on a city pavement of 4 to 5 miles an hour, would be found in from 1 to 2 feet, but that if it was stopped with the wheel turned, it would be stopped in 4 to 5 feet.

A physician testified as to his services and his knowledge of his charges and the charges of his hospital. He said that the physician testified.

The testimony given on the stand of the witness and other persons who were witnesses on the stand was to the effect of the witness. The testimony of this witness was that the witness the automobile traveling west on the street at a speed of about 40 miles an hour; that the automobile was from 50 to 60 feet west of the intersection of the line the witness was standing at when the investigation, and that the witness stood on the sidewalk; that the driver of the automobile failed to swing out of the way of the street car, and that the automobile "flew across" the street car; that the location of the witness was from the street car across the intersection in order to get it out of the way of traffic, and that the location of the street car was not sufficient to get the first of the crash.

Other witnesses, the location of the witness and, testified that he was 45 years of age, and that he had been married at a certain time in 1925; that he was a witness in the case of the defendant against the defendant and his attorney, a woman who was called upon to testify that he knew the name of the car, tested that and was not in contact with the witness at the hospital on the defendant's stand, that he started the car and went about 1 foot west in his automobile.

coming east about 200 feet away at about 35 miles an hour; that he sounded the gong, and that when it appeared that the automobile was not going to stop, he applied his brakes and brought the street car to a stop on the eastbound tracks of Lake Street; that the automobile continued to travel east and struck the street car and then struck a pillar, and that the automobile did not slacken its speed when approaching the intersection, and that there were no vehicles in front of the street car to obstruct his view.

It is manifest from the above statements that there was a clear conflict as to the essential issues. We have not summarized the testimony introduced in behalf of the defendants because we have been searching the record in an endeavor to ascertain whether there was sufficient competent evidence, viewed in its most favorable light, from the standpoint of plaintiffs, to require submission of the case to the jury. We have, however, read and considered all the evidence. The burden rested on plaintiffs to show affirmatively that they were in the exercise of due care, or to raise a reasonable inference of such care. It was also the duty of plaintiffs to show affirmatively that defendants, by their servant, were guilty of negligence which was the proximate cause of the injuries. A careful perusal of the testimony convinces us that in directing the verdict, the court invaded the province of the jury. We have read the oral opinion of the trial judge wherein he correctly states the principles of law involved. We also note that he announced that in deciding the motion to instruct the jury for defendants, he had no right to weigh the evidence. Despite that statement, it is manifest that he did weigh the evidence. We are of the opinion that the court was not warranted in holding as a matter of law that plaintiffs were guilty of contributory negligence. Reverence of the views expressed, the judgment of the Circuit Court of Cook County is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

DENIS E. SULLIVAN, P.J. AND HESSEL, J. CONCUR.

GUARDIAN BANCORPORATION, a corporation,

299 I.A. 519³

v.

JAMES A. LOW,

APPEAL FROM

MUNICIPAL COURT

In Re: Intervening Petition JOHN W.
BENNETT and EDWARD W. COLBACH, Attorneys,

OF CHICAGO.

Appellees,

v.

JAMES A. LOW, CORHAM BROOKS, et al.,
Trustees,

Appellants.

45A

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

On March 15, 1932, a judgment was obtained in the Municipal Court of Chicago by the Guardian Bancorporation against James A. Low for the sum of \$34,098.75. An appeal was taken to this court. Pending the appeal, Low died, his death was suggested here, and the cause proceeded in the name of his executor. On April 11, 1933, an order was entered in this court affirming the judgment. On February 14, 1935, the Guardian Bancorporation assigned the judgment and all the right, title and interest therein to Corham Brooks, Robert W. Emmons, II, James Jackson, Graham Aldis and Russel Tyson, as trustees, and the assignment contained a recital to the effect that the judgment had been allowed as a claim against the estate of James A. Low, deceased, in the Probate Court of Cook County on April 8, 1933. On March 31, 1937, John W. Bennett and Edward W. Colbach, the attorneys who represented the Guardian Bancorporation in obtaining the judgment against James A. Low, filed a claim in the Probate Court of Cook County in which they set forth all the facts alleged in the Municipal Court upon which judgment was entered and alleged that the Probate Court had complete and exclusive jurisdiction to adjudicate their claim; prayed that the court impress a lien for attorneys' fees on the claim allowed in the Probate Court

913 A.I. 993

Exhibit 100

Handwritten signature or initials, possibly "A.H."

In the foregoing opinion, the court is of the opinion that the plaintiff is entitled to the relief prayed for.

IT IS ORDERED that the plaintiff recover of the defendant the sum of \$10,000, with interest thereon at the rate of 6% per annum from the date of the filing of this judgment.

THE COURT is of the opinion that the plaintiff is entitled to the relief prayed for. The defendant has failed to establish its defense. The plaintiff has established its case by a preponderance of the evidence. The court finds in favor of the plaintiff and against the defendant. The court awards the plaintiff the sum of \$10,000, with interest thereon at the rate of 6% per annum from the date of the filing of this judgment. The court also awards the plaintiff its costs of suit. The court enters this judgment and decree on this 10th day of January, 1933.

against the estate of Low and upon the funds derived therefrom. After a hearing in the Probate Court that court dismissed the petition of Messrs. Bennett and Colbach. From the order of dismissal entered on November 30, 1937, Bennett and Colbach appealed to the Circuit Court of Cook County. The record indicates that this appeal is still pending. Thereafter, on December 2, 1937, Bennett and Colbach filed a petition in the Municipal Court of Chicago in the original suit of the Guardian Bancorporation against James A. Low, in which they allege that they have a lien for attorneys' fees against the trustees, assignees, of the judgment against Low for services rendered the Guardian Bancorporation in procuring the original judgment, and in representing plaintiff, the Guardian Bancorporation, in the Appellate Court.

The petition in the Municipal Court seeks the same relief as that sought in the Probate Court. A motion by defendants was made to dismiss the petition for the reason, among others, that the court was without jurisdiction to entertain the petition and claim; that the Probate Court had complete jurisdiction of the subject matter, and that the matter was lis pendens and undisposed of in the Circuit Court of Cook County, where the appeal is still pending. After a hearing on the petition and motion to dismiss and the answer of the defendant trustees, the court entered judgment against the trustees for the sum of \$1,440.19. This is an appeal from that judgment.

In In re Estate of Stahl, 287 Ill. 538, a petition was filed in the Probate Court of Cook County by the administrator of the estate, seeking an order for the sale of real estate to pay debts. In that proceeding the question arose as to the ownership of the real estate by the person whose estate was being administered. It seems that the same question has been raised in another proceeding and the question of the ownership had been determined in that pro-

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ceeding. The court held that the Probate Court was without jurisdiction, and said:

"The controlling fact or question in this case is as to the ownership of the real estate in question at the time of the death of said Fredericka E. Stahl. That was the controlling fact in the former cases. Reason and public policy alike demand that when a matter, whether consisting of one or more questions, has been solemnly adjudicated, it shall be deemed finally and conclusively settled in all subsequent litigation between the same parties when the same question arises. (Hanna v. Hand, 102 Ill. 596)."

In Bacon v. Reichelt, 273 Ill. 90, it was held that:

"A prior adjudication between the same parties is conclusive upon them, not only as to the matters actually determined, but as to every other thing within the knowledge of the parties which might have been set up as a ground for relief or defense. Ruegger v. Indianapolis and St. Louis Railroad Co., 103 Ill. 449; Rogers v. Higgins, 67 id. 244; Hamilton v. Gimby, 46 id. 90; Koby v. Calumet and Chicago Canal and Dock Co., 165 id. 277."

The petitioners, having submitted their claim to the Probate Court, and in the absence of any showing that that court had not complete jurisdiction of the entire subject matter, we conclude that the Municipal Court, upon the fact being presented to it, as it was, that the claim was pending and undisposed of in the Probate Court, should have dismissed the petition. Therefore, the judgment of the Municipal Court of Chicago is reversed and the cause is remanded with the direction that the petition of Bennett and Golbach be dismissed.

REVERSED AND REMANDED WITH DIRECTIONS.

DENIS E. SULLIVAN, P.J. CONCURS,
HURKE, J. TAKES NO PART.

40263

JAMES A. BUNCESS,

(Plaintiff) Appellee,

v.

JOHN RAKLIOS & COMPANY, INC., a
Corporation,

(Defendant) Appellant.

APPEAL FROM

SUPERIOR COURT

4299 I.A. 619⁴

COOK COUNTY.

46A

MR. JUSTICE MEHEL DELIVERED THE OPINION OF THE COURT.

This is an action at law to recover damages for personal injuries which the plaintiff claims were caused by unwholesome food served to him in a restaurant owned and operated by the defendant. There was a verdict by the jury and judgment was entered by the court for the plaintiff in the sum of \$750. The defendant moved for a directed verdict at the close of the plaintiff's case, for a directed verdict at the close of all the evidence, and for a judgment notwithstanding the verdict. The three motions were denied by the trial court. The plaintiff moved to set aside the judgment and for a new trial, which motion was allowed.

The cause is in this court upon the defendant's two appeals, one an application for leave to appeal from the order granting the plaintiff a new trial, and the other an appeal from the orders denying the defendant's motion for a directed verdict and a judgment notwithstanding the verdict.

As we have indicated, the petition for leave to appeal by the defendant in this court from the order of the trial court granting plaintiff's motion for a new trial was denied, and this ruling of the court is in effect that the trial court acted properly in allowing the plaintiff's motion for a new trial notwithstanding the verdict of the jury. So that when we come to consider defendant's motion for a directed verdict, it would seem rather inconsistent for this court to pass upon the question that has been called to its attention by the appeals here pending, for the reason that this court

has considered and passed upon the petition for leave to appeal filed by the defendant in this case, and reached the conclusion that the trial court was justified in allowing plaintiff's motion for a new trial.

The matter is still pending in the trial court and the questions raised here may be properly considered by that court upon a further trial in disposing of the litigation. Therefore, in our opinion it would be inconsistent for us to hold that the trial court was justified in granting the plaintiff's motion for a new trial and in denying defendant leave to appeal, and then consider the question as to whether the court was in error in denying the defendant's motion for a directed verdict, as we have indicated.

For the reasons stated, the appeal is dismissed.

APPEAL DISMISSED.

DENIS E. SULLIVAN, P.J. JACOBS,
BURKE, J. TAKES NO PART.

and concluded the trial with the decision that the trial
 was by the defendant in this case. The evidence was
 that the trial court was justified in its decision.

THE COURT IS NOW READY.

The matter is still pending in the trial court and the
 question arises as to whether the defendant is entitled to a
 new trial. It is well settled that a defendant is entitled to a
 new trial if the evidence is such that the jury could not
 reasonably have reached its verdict. In this case, the
 evidence is such that the jury could not reasonably have
 reached its verdict. Therefore, the defendant is entitled to a
 new trial.

THE COURT IS NOW READY.

Let the verdict stand, the court is satisfied.

THE COURT IS NOW READY.

THE COURT IS NOW READY.

40275

SOPHIE CIMAROLI,

(Plaintiff) Appellant,

v.

CITY OF CHICAGO, a Municipal
Corporation,

(Defendant) Appellee.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

47A
299 I.A. 620

MR. JUSTICE REBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff from a judgment entered by the court for the defendant notwithstanding the verdict of the jury was for the plaintiff.

It is charged in the statement filed by the plaintiff that on November 23, 1936 she was riding as a passenger in an automobile which was being operated in a westerly direction on 116th Street at or near its intersection with Indiana Avenue, in the City of Chicago, and that she was in the exercise of due care and caution for her own safety; that the defendant had charge and control of, and was operating a dump truck in a northerly direction on Indiana Avenue, and was executing a right turn into 116th Street; that the defendant did one or more of the following acts: (a) Carelessly and negligently operated the truck; (b) carelessly executed a right turn which was not as close as practical to the right-hand curb, in violation of the Statute of Illinois; (c) carelessly and negligently drove the motor truck to the left side of 116th Street when traversing an intersection, contrary to the statute; (d) carelessly and negligently drove the motor truck upon the left half of 116th Street, contrary to the statute; (e) carelessly and negligently failed to give an audible warning with a horn, contrary to the statute; (f) carelessly and negligently, and without warning drove the motor truck from Indiana Avenue into 116th Street and to the left side of 116th Street when the left side was not clearly visible

100

1. *Journal of the American Medical Association*, 1997; 277: 1033-1038.

At 10:00

of the same for the following reasons: the results of the

1. The following information is being furnished to you for your information only and is not to be used for any other purpose.

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and the view thereof was obstructed by motor vehicles parked parallel with the south curb of 118th Street, without exercising care to discover the presence of the automobile in which plaintiff was riding; by reason of which the automobile in which the plaintiff was riding came into contact with the defendant's motor truck, and the plaintiff was injured.

The answer filed by the defendant denied that the plaintiff was in the exercise of due care and caution for her own safety, and denied that the defendant did any of the acts of negligence alleged in the complaint.

At the close of the plaintiff's case the court denied the defendant's motion for a directed verdict. At the close of all the evidence the court reserved ruling on the defendant's motion for a directed verdict, and submitted the case to the jury. The jury returned a verdict against the defendant for \$1500. Thereafter the defendant filed a written motion for a new trial. The court heard arguments on the motion and entered a judgment for the defendant notwithstanding the verdict for the plaintiff. The appeal here is prosecuted by the plaintiff from this judgment.

From the evidence it appears that the plaintiff, on November 23, 1936, was a single woman, 23 years of age. At that time her name was Sophie Irolek and she lived at 8027 South Maplewood Avenue, Chicago, Illinois. She expected to be married shortly, and had spent the morning of November 23, 1936, apartment hunting with her prospective husband in the neighborhood of his home at 11737 South Calumet Avenue, Chicago. About two o'clock she decided to go home, and it was arranged that her future husband's brother, Guerino Giaroli, would drive her home in his brother's 1931 Chevrolet two-door sedan automobile. It was a cold day, and she obtained a blanket which she strapped around her feet after removing her shoes,

the view of the Commission, the Commission has no objection to the proposed amendment, and the Commission has no objection to the proposed amendment.

The answer filed by the defendant admits that the defendant was in the possession of the said rifle and that the defendant was in the possession of the said rifle at the time of the shooting.

It is stated by the witness that the witness was not present at the time the witness was arrested, and that the witness was not present at the time the witness was released from custody. The witness further stated that the witness was not present at the time the witness was taken to the hospital, and that the witness was not present at the time the witness was taken to the morgue. The witness further stated that the witness was not present at the time the witness was taken to the funeral home, and that the witness was not present at the time the witness was taken to the cemetery. The witness further stated that the witness was not present at the time the witness was taken to the crematorium, and that the witness was not present at the time the witness was taken to the interment. The witness further stated that the witness was not present at the time the witness was taken to the final resting place, and that the witness was not present at the time the witness was taken to the final resting place.

On the morning of August 1, 1934, the following was received from the Chicago office of the Chicago Police Department:

On August 1, 1934, at 10:30 a.m., the Chicago Police Department received a call from a woman who stated that she had information regarding the whereabouts of a man named [redacted] who was believed to be in the Chicago area. The woman stated that she had been contacted by a man who offered her a large sum of money to assist him in his escape from the United States. She stated that she had refused the offer and was now seeking help from the police.

The Chicago Police Department immediately conducted a search for the man named [redacted] and located him at a residence in the Chicago area. The man was arrested and taken to the Chicago Police Department for further investigation.

The woman who provided the information was identified as [redacted] and was interviewed by the Chicago Police Department. She stated that she was a widow and had been living alone for some time. She stated that she was not involved in any criminal activity and was simply seeking help from the police.

The Chicago Police Department conducted a search for the man named [redacted] and located him at a residence in the Chicago area. The man was arrested and taken to the Chicago Police Department for further investigation.

The Chicago Police Department is currently conducting an investigation into the matter and is seeking further information regarding the man named [redacted] and the woman who provided the information.

Very truly yours,
[redacted]
Chicago Police Department

to keep her feet warm.

Guerino Cimaroli drove the car. He was 31 years of age, had driven cars since 1929. He had been a truck driver in the Civilian Conservation Corps where he had driven for a year and a half and was an experienced automobile driver. The brakes on his brother's car were in good condition, and the car had a city sticker on it. It was a dreary day; had been snowing a little, and the weather was cold.

The plaintiff sat in the front seat, next to the driver. Cimaroli drove the car to the place where the accident occurred. This accident occurred at 116th Street on the east sidewalk of Indiana Avenue. 116th Street was a paved street 30 feet 8 inches wide. Indiana Avenue also was a paved street, 30 feet 3 inches wide. Indiana Avenue ended at 116th Street, intersecting the latter street only from the south. On the southeast corner of the intersection there was a tavern. From the south curb of 116th Street to the tavern was a distance of 17 feet 5 inches. From the east curb of Indiana Avenue to the tavern was a distance of 23 feet 8 inches. There was a sidewalk on each side of the tavern, each sidewalk being 6 feet 3 inches wide. As Cimaroli operated the car west on 116th Street towards Indiana Avenue he was traveling on the north side of the street on the inner lane, and the left wheels of the car were north of the center line of 116th Street all of the way from Prairie Avenue to the point of the collision with the defendant's truck. The car was going at a speed of 10 or 15 miles an hour, the driver never having his foot on the accelerator at any time. There was a single automatic windshield wiper, and this wiper was working, but there was no snow on the windshield.

It further appears from the evidence that at or near the time of the accident the driver and the plaintiff were not talking, and

Journal of Management Education 26(9)p. 1078-1094

1. The first step is to identify the key components of the system, including the hardware, software, and data. This involves a thorough review of the system architecture and the identification of the various components that make up the system.

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provided that the total number of persons in the household is not more than 10.

10. The following information is available for the year ended 31/12/2014:

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Figure 1. The effect of the concentration of the polymer on the gelation time of the polymer solution. The concentration of the polymer was 0.1, 0.2, 0.3, 0.4, 0.5, 0.6, 0.7, 0.8, 0.9, 1.0, 1.1, 1.2, 1.3, 1.4, 1.5, 1.6, 1.7, 1.8, 1.9, 2.0, 2.1, 2.2, 2.3, 2.4, 2.5, 2.6, 2.7, 2.8, 2.9, 3.0, 3.1, 3.2, 3.3, 3.4, 3.5, 3.6, 3.7, 3.8, 3.9, 4.0, 4.1, 4.2, 4.3, 4.4, 4.5, 4.6, 4.7, 4.8, 4.9, 5.0, 5.1, 5.2, 5.3, 5.4, 5.5, 5.6, 5.7, 5.8, 5.9, 6.0, 6.1, 6.2, 6.3, 6.4, 6.5, 6.6, 6.7, 6.8, 6.9, 7.0, 7.1, 7.2, 7.3, 7.4, 7.5, 7.6, 7.7, 7.8, 7.9, 8.0, 8.1, 8.2, 8.3, 8.4, 8.5, 8.6, 8.7, 8.8, 8.9, 9.0, 9.1, 9.2, 9.3, 9.4, 9.5, 9.6, 9.7, 9.8, 9.9, 10.0, 10.1, 10.2, 10.3, 10.4, 10.5, 10.6, 10.7, 10.8, 10.9, 11.0, 11.1, 11.2, 11.3, 11.4, 11.5, 11.6, 11.7, 11.8, 11.9, 12.0, 12.1, 12.2, 12.3, 12.4, 12.5, 12.6, 12.7, 12.8, 12.9, 13.0, 13.1, 13.2, 13.3, 13.4, 13.5, 13.6, 13.7, 13.8, 13.9, 14.0, 14.1, 14.2, 14.3, 14.4, 14.5, 14.6, 14.7, 14.8, 14.9, 15.0, 15.1, 15.2, 15.3, 15.4, 15.5, 15.6, 15.7, 15.8, 15.9, 16.0, 16.1, 16.2, 16.3, 16.4, 16.5, 16.6, 16.7, 16.8, 16.9, 17.0, 17.1, 17.2, 17.3, 17.4, 17.5, 17.6, 17.7, 17.8, 17.9, 18.0, 18.1, 18.2, 18.3, 18.4, 18.5, 18.6, 18.7, 18.8, 18.9, 19.0, 19.1, 19.2, 19.3, 19.4, 19.5, 19.6, 19.7, 19.8, 19.9, 20.0, 20.1, 20.2, 20.3, 20.4, 20.5, 20.6, 20.7, 20.8, 20.9, 21.0, 21.1, 21.2, 21.3, 21.4, 21.5, 21.6, 21.7, 21.8, 21.9, 22.0, 22.1, 22.2, 22.3, 22.4, 22.5, 22.6, 22.7, 22.8, 22.9, 23.0, 23.1, 23.2, 23.3, 23.4, 23.5, 23.6, 23.7, 23.8, 23.9, 24.0, 24.1, 24.2, 24.3, 24.4, 24.5, 24.6, 24.7, 24.8, 24.9, 25.0, 25.1, 25.2, 25.3, 25.4, 25.5, 25.6, 25.7, 25.8, 25.9, 26.0, 26.1, 26.2, 26.3, 26.4, 26.5, 26.6, 26.7, 26.8, 26.9, 27.0, 27.1, 27.2, 27.3, 27.4, 27.5, 27.6, 27.7, 27.8, 27.9, 28.0, 28.1, 28.2, 28.3, 28.4, 28.5, 28.6, 28.7, 28.8, 28.9, 29.0, 29.1, 29.2, 29.3, 29.4, 29.5, 29.6, 29.7, 29.8, 29.9, 30.0, 30.1, 30.2, 30.3, 30.4, 30.5, 30.6, 30.7, 30.8, 30.9, 31.0, 31.1, 31.2, 31.3, 31.4, 31.5, 31.6, 31.7, 31.8, 31.9, 32.0, 32.1, 32.2, 32.3, 32.4, 32.5, 32.6, 32.7, 32.8, 32.9, 33.0, 33.1, 33.2, 33.3, 33.4, 33.5, 33.6, 33.7, 33.8, 33.9, 34.0, 34.1, 34.2, 34.3, 34.4, 34.5, 34.6, 34.7, 34.8, 34.9, 35.0, 35.1, 35.2, 35.3, 35.4, 35.5, 35.6, 35.7, 35.8, 35.9, 36.0, 36.1, 36.2, 36.3, 36.4, 36.5, 36.6, 36.7, 36.8, 36.9, 37.0, 37.1, 37.2, 37.3, 37.4, 37.5, 37.6, 37.7, 37.8, 37.9, 38.0, 38.1, 38.2, 38.3, 38.4, 38.5, 38.6, 38.7, 38.8, 38.9, 39.0, 39.1, 39.2, 39.3, 39.4, 39.5, 39.6, 39.7, 39.8, 39.9, 40.0, 40.1, 40.2, 40.3, 40.4, 40.5, 40.6, 40.7, 40.8, 40.9, 41.0, 41.1, 41.2, 41.3, 41.4, 41.5, 41.6, 41.7, 41.8, 41.9, 42.0, 42.1, 42.2, 42.3, 42.4, 42.5, 42.6, 42.7, 42.8, 42.9, 43.0, 43.1, 43.2, 43.3, 43.4, 43.5, 43.6, 43.7, 43.8, 43.9, 44.0, 44.1, 44.2, 44.3, 44.4, 44.5, 44.6, 44.7, 44.8, 44.9, 45.0, 45.1, 45.2, 45.3, 45.4, 45.5, 45.6, 45.7, 45.8, 45.9, 46.0, 46.1, 46.2, 46.3, 46.4, 46.5, 46.6, 46.7, 46.8, 46.9, 47.0, 47.1, 47.2, 47.3, 47.4, 47.5, 47.6, 47.7, 47.8, 47.9, 48.0, 48.1, 48.2, 48.3, 48.4, 48.5, 48.6, 48.7, 48.8, 48.9, 49.0, 49.1, 49.2, 49.3, 49.4, 49.5, 49.6, 49.7, 49.8, 49.9, 50.0, 50.1, 50.2, 50.3, 50.4, 50.5, 50.6, 50.7, 50.8, 50.9, 51.0, 51.1, 51.2, 51.3, 51.4, 51.5, 51.6, 51.7, 51.8, 51.9, 52.0, 52.1, 52.2, 52.3, 52.4, 52.5, 52.6, 52.7, 52.8, 52.9, 53.0, 53.1, 53.2, 53.3, 53.4, 53.5, 53.6, 53.7, 53.8, 53.9, 54.0, 54.1, 54.2, 54.3, 54.4, 54.5, 54.6, 54.7, 54.8, 54.9, 55.0, 55.1, 55.2, 55.3, 55.4, 55.5, 55.6, 55.7, 55.8, 55.9, 56.0, 56.1, 56.2, 56.3, 56.4, 56.5, 56.6, 56.7, 56.8, 56.9, 57.0, 57.1, 57.2, 57.3, 57.4, 57.5, 57.6, 57.7, 57.8, 57.9, 58.0, 58.1, 58.2, 58.3, 58.4, 58.5, 58.6, 58.7, 58.8, 58.9, 59.0, 59.1, 59.2, 59.3, 59.4, 59.5, 59.6, 59.7, 59.8, 59.9, 60.0, 60.1, 60.2, 60.3, 60.4, 60.5, 60.6, 60.7, 60.8, 60.9, 61.0, 61.1, 61.2, 61.3, 61.4, 61.5, 61.6, 61.7, 61.8, 61.9, 62.0, 62.1, 62.2, 62.3, 62.4, 62.5, 62.6, 62.7, 62.8, 62.9, 63.0, 63.1, 63.2, 63.3, 63.4, 63.5, 63.6, 63.7, 63.8, 63.9, 64.0, 64.1, 64.2, 64.3, 64.4, 64.5, 64.6, 64.7, 64.8, 64.9, 65.0, 65.1, 65.2, 65.3, 65.4, 65.5, 65.6, 65.7, 65.8, 65.9, 66.0, 66.1, 66.2, 66.3, 66.4, 66.5, 66.6, 66.7, 66.8, 66.9, 67.0, 67.1, 67.2, 67.3, 67.4, 67.5, 67.6, 67.7, 67.8, 67.9, 68.0, 68.1, 68.2, 68.3, 68.4, 68.5, 68.6, 68.7, 68.8, 68.9, 69.0, 69.1, 69.2, 69.3, 69.4,

Figure 1. The effect of the concentration of the inhibitor on the rate of polymerization of the monomer.

after leaving Prairie Avenue, the plaintiff took her cigarettes out of her purse, took a cigarette and put it in her mouth, took a match, lighted it and was in the act of lighting the cigarette when the collision occurred. There was no warning or honk of a horn prior to the collision. She simply started to light her cigarette and the next thing she remembered was a jerk backward, then forward. She looked up and saw the defendant's truck up against the front of their car, and she became nervous. The left front of their car was up against the left side of the truck.

The driver, Cimaroli, testified that as he approached Indiana Avenue there was another car, moving ahead of him also in a westerly direction, traveling 25 or 30 feet ahead of him. There was a car parked at the left curb of 116th Street on the east crosswalk of Indiana Avenue, about 3 feet from the corner. There were also two or three other cars parked at the south curb. There was also another car parked at the north curb of 118th Street. As Cimaroli approached Indiana Avenue the car that had been ahead of him turned toward the right and continued west. Suddenly the defendant's truck appeared right in front of him, when he was only 10 feet away. He tried to turn to the right, but there was a car parked there, so he applied the brakes at once, and the car skidded and the car and the truck collided. The truck was a big Mack truck, loaded with dirt and weighed 5 or 6 tons. It was 10 or 12 feet wide and 18 feet long. When Cimaroli first saw the truck it was pointed north - northeast - and had not completely straightened out facing east, after making a right turn from Indiana Avenue. The front of the truck was even with the east cross-walk on Indiana Avenue, and was 3 or 4 feet north of the center of 116th Street. The truck sounded no horns or signals prior to the accident. From the moment he first saw the truck until the moment of the impact only a second or less time elapsed.

[illegible]

The impact threw the plaintiff into the windshield and she received serious injuries, including a fractured nose, permanent internal nasal injuries, lacerations on her face, chipped and broken teeth, and many bruises and contusions on her head and body, all of which caused her severe and lasting pain.

It is suggested and admitted that the truck made the right turn from Indiana Avenue into 116th Street without stopping.

The plaintiff suggests that there is but a single question presented for review, and that is whether the evidence of the plaintiff is legally sufficient to sustain the cause of action, and further suggests that where the evidence is conflicting it is for the plaintiff to establish her case by a preponderance of the evidence, and prove that she was in the exercise of due care and caution for her own safety at the time the accident occurred.

Counsel for the defendant in reply to the argument of the plaintiff that the sole question presented here is whether the evidence introduced by her, taken as true, makes out a prima facie case, states that the record discloses error in the case that would have entitled the defendant to a new trial if a judgment notwithstanding the verdict had not been entered by the trial court, and that the record clearly discloses that the verdict was contrary to the manifest weight of the evidence, and then calls the attention of this court to the facts as disclosed by witnesses for the defendant.

Evidence is offered that one Eugene Bowles was the motor truck driver and that he was an employee of the defendant, the City of Chicago, and had been so employed for twenty-three years; that he was hauling a load of dirt with a three ton sack truck; that it was a bad day, snowing, not very hard, but there was enough snow on the street to cause a skid if the brakes were applied. At the time and just prior to the accident he was traveling north on Indiana Avenue. When he came to the south sidewalk line of 116th Street, he stopped to permit

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

100-443887-1000

● 本報地址：重慶市中二路新報社 電話：(023) 20560000 郵政代辦所：重慶市郵局 郵政代辦所：重慶市郵局

... .., and of

some children to pass from the west to the east on the crosswalk. After the children had passed, he put the truck in first speed, and turned the corner of 118th Street, going east. He saw Oimarioli's car coming west, the windshield full of snow; and this witness further testified that figuring the driver of the car could not see him, he came to a dead stop; that the front end of the truck was about 10 feet east of the crosswalk. "I stopped in order to give the man a chance to go around this machine, he would have a clear road to the left of me, but instead of that he ran head on into my truck." He further testified that at the time of the collision the truck was stationary.

There were other witnesses, three of whom were police officers, and one a laborer who was employed by the City and riding with the truck driver. From the evidence offered by the police officers they saw skid marks extending at least 10 feet from the back of the car in which the plaintiff was riding; that the front end of the truck was about a foot or two south of the center line of the road. So that when we come to examine the facts, it was clearly a question for the jury, not alone to pass upon the weight of the evidence, but to determine the credibility of the witnesses. There was sufficient evidence to justify the court in permitting the jury to pass upon these questions, and the jury having passed upon them returned a verdict for the amount hereinabove stated. In compliance with the familiar rule that a verdict cannot be directed for the defendant where the evidence, taken as true, together with the most favorable inferences that can be drawn from such evidence, tends to support the allegations of the plaintiff's complaint and sufficient to make out a prima facie case for the plaintiff, the court should have denied the motion of the defendant.

Several cases in which the Supreme and Appellate Courts of Illinois have passed upon this question, have been called to our attention, one of which is Hally v. Chicago City Ry. Co. 143 Ill. 640,

It appears from this case that the plaintiff recovered a verdict and judgment in a personal injury suit, which was affirmed by the Appellate Court for the First District of Illinois. A certificate of importance and appeal was granted by the Appellate Court, and upon review the Supreme Court said:

"It is first insisted that the court was in error in refusing to exclude the evidence and instruct the jury to find defendant not guilty. A motion of this character, accompanied by the proper instruction, was made at the close of the plaintiff's case and renewed again at the close of all the evidence. The court refused to give the instruction, and its refusal is assigned as error. The only question raised and preserved for review in this court on such motion is, does the evidence on the part of the plaintiff, if taken as true and most favorably considered for him, with all just inferences to be drawn therefrom, make out a prima facie case on the part of the plaintiff? The question of the weight of the evidence or the credibility of the witnesses cannot be considered. If there was any evidence in the record from which, standing alone, the jury might, without acting unreasonably in the eyes of the law, have found the material averments of the declaration to have been sustained, the motion was properly denied and the instruction refused. (Mourazer v. Reid, Mardeeh & Co. 176 Ill. 404; Libby McNeill & Libby v. Cook, 328 Id. 308; Davine v. Delang, 272 Id. 186.) We can, therefore, only review the evidence at this time for the purpose of ascertaining whether or not the evidence on the part of appellee established a prima facie case."

In the case we have before us the evidence as to what occurred at the time of the collision is conflicting, and it was for the jury to consider the questions of fact as well as the credibility of the witnesses and determine from this evidence whether the plaintiff made out a prima facie case. In determining this question so far as we are permitted to do so, we believe the plaintiff did establish a prima facie case, and therefore the court erred in sustaining the defendant's motion.

In the case of Myers v. Northwestern Ill. R. R. Co. 216 Ill. 24, the Supreme Court held that the Appellate Court is not authorized to reverse, without remanding the cause, a judgment for the plaintiff on a finding of fact that the plaintiff was guilty of contributory negligence, where the evidence is contested and that for the plain-

It is a very old and well known fact that the
and judgment in a personal injury case is
and the fact that the plaintiff is a
of damages and the fact that the plaintiff is
and the fact that the plaintiff is a

[illegible]

As the Court has held in the past, it is not necessary
of the fact of the defendant's knowledge, but it is not the law
to consider the possibility of such as well as the possibility of the
defendant and his associates from this evidence. The Court
has not a right to do so. It is established that the defendant
was not a party to the crime, and therefore he cannot be convicted of
the crime. He is entitled to a full trial and a fair hearing.

On the basis of the above information, it is recommended that the proposed project be approved for funding.

tiff is sufficient to preclude the trial court from directing a verdict for the defendant.

This rule has been approved by the Supreme Court in Shannon v. Northfield, 201 Ill. 108; also in Valley v. Chicago Rapid Transit Co., 335 Ill. 184.

It is suggested in the briefs that the evidence of witnesses is contradictory, but as we have previously stated, that subject was properly one for the jury. No doubt the jury considered the evidence in the light of this accident and concluded that it was sufficient to sustain the plaintiff's case. We are inclined to agree with the jury, and having reached this conclusion we are of the opinion that the court was in error in entering judgment for the defendant notwithstanding the verdict for the plaintiff, and being an erroneous order, the order of this court is that the judgment order entered by the trial court be reversed and judgment entered here, in accordance with the verdict of the jury, for \$1,500.

REVERSED AND JUDGMENT HERE.

DENIS E. SULLIVAN, P.J. CONCURS,
BURKE, J. TAKES NO PART.

40301

FULLMAN TRUST & SAVINGS BANK, a
Corporation,

(Plaintiff) Appellant,

v.

LUCIAN JARECKI and VICTORIA JARECKI,
his wife, et al.,

(Defendants) Appellees.

APPEAL FROM

48
299 L.A. 620¹

MR. JUSTICE REBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff from an order entered by the court on February 8, 1938, overruling and denying plaintiff's motion, which was filed on January 21, 1938, to vacate and exonerate the order entered on January 17, 1935, vacating a deficiency decree entered in the above cause.

This is a foreclosure proceeding filed by the plaintiff on May 23, 1935 to foreclose the lien of two trust deeds, both executed by Lucian Jarecki and Victoria Jarecki. Summons was issued on both of the defendants, who failed to appear, enter an appearance or file an answer. On September 25, 1935, an order of default on personal service and taking the complaint as confessed against the defendants Lucian Jarecki and Victoria Jarecki was entered.

Thereafter, on October 23, 1935 a foreclosure decree was entered upon the report of the master, a sale was had and upon approval of the sale a deficiency decree was entered in favor of the plaintiff and against the defendants, Lucian Jarecki, Victoria Jarecki, Joseph Macewicz and Frances Macewicz, for \$1,453.06.

Thereafter on December 28, 1935, the defendants Lucian Jarecki and Victoria Jarecki, upon written notice to the plaintiff, made a motion in open court for leave to intervene and file a petition for the vacation of the deficiency decree entered against them, and on this day an order was entered that the motion filed

this day be continued to December 31, 1935. It is contended by the plaintiff that the defendants Lucian Jarecki and Victoria Jarecki did not, nor did any one on their behalf, on December 28, 1935, or any other day, within 30 days from the date of the entry of the deficiency decree, file any written, typewritten or printed motion, petition, affidavit or other document, except a notice of motion filed on December 28, 1935, for leave to intervene and file a petition for the vacation of the deficiency decree.

Thereafter on December 31, 1935, the court entered an order giving Lucian Jarecki and Victoria Jarecki leave to file instant a petition to vacate the deficiency decree and set the hearing on the petition and any answers and motions which might be filed thereto for January 30, 1936, on the contested motion calendar, and on January 15, 1936, the plaintiff filed a typewritten motion to strike the last mentioned petition on several grounds, including want of jurisdiction. This petition and motion to strike came on for hearing on January 27, 1936, and the court entered an order sustaining plaintiff's motion to strike the petition. On the same day the court entered a further order giving the defendant Lucian Jarecki and Victoria Jarecki leave to file an amended petition within 10 days from that date, directing the plaintiff to answer within 5 days thereafter and setting the cause for hearing on February 14, 1936.

The named defendants filed a typewritten amended petition for the vacation of the deficiency decree, and on February 8, 1936, the plaintiff filed a typewritten motion to strike the amended petition, or affidavit, upon several grounds, including want of jurisdiction. Plaintiff's motion to strike came on for hearing on February 17, 1936, and on that day the court entered an order vacating the deficiency decree against the defendants Lucian Jarecki and Victoria Jarecki.

2

The plaintiff took the position that the order entered on February 17, 1936, purporting to vacate the deficiency decree was void for want of jurisdiction and therefore was a nullity and should be ignored and disregarded, and the plaintiff caused an alias execution to be issued and had the sheriff make a levy.

Thereafter the plaintiff presented and filed a written motion on January 21, 1938, to vacate and expunge the aforesaid purported order entered on February 17, 1936, which was almost 2 years after that date, on the ground that the court had no jurisdiction to enter the purported order because it was based on an amended petition to vacate filed on February 6, 1936, which was more than 30 days after the entry of the deficiency decree, and further moved the court to dismiss the amended petition on which the purported order was based for want of jurisdiction.

On February 8, 1938, the court entered an order overruling and denying the last mentioned motion of the plaintiff, which was filed on January 21, 1938.

The plaintiff contends that the motion is not according to the provision of the section of the statute which requires that the matter shall be presented by a written motion and affidavit, and relies upon Ch. 110, Par. 174 of Sec. 50, sub-par. 7, of the Civil Practice Act, Ill. St. Bar Stats. 1937; and further contends that Par. 138, Sec. 74 (2) of the Civil Practice Act in abolishing distinctions between the common law record, the bill of exceptions and the certificate of evidence clearly intends that motions shall be in writing, and points to Paragraph 1 of Rule 6 of the Rules of Practice and Procedure adopted by the Supreme Court of Illinois and contends that it provides that all papers shall be fairly and legibly written, typewritten or printed, and the clerk shall not file such as do not conform to the rule.

The question here is not whether these defendants complied with the rules as required, but whether the court on December 28, 1935 had jurisdiction to entertain the order complained of. The court had jurisdiction, but the only complaint made at the time the matter was presented to the court was not that the motion was not in writing but that it was presented in an informal manner to the court and, upon motion made in open court the court entered the order complained of, and that it was the defendants' motion "for leave to intervene and file a petition for the vacation of the deficiency decree" against them. The plaintiff contends that it was a motion for leave to file a petition for the vacation of the deficiency decree, and not a motion to vacate this decree; did not constitute a motion to vacate, and was not sufficient to give the court jurisdiction.

We agree that the rule provides that petitions and affidavits must be prepared in writing and presented to the court and filed, but this is not a petition nor an affidavit; it is a motion for leave to intervene and file a petition for the vacation of the deficiency decree, and while it was not presented in the manner required by the rule, still the court entertained the motion and entered it. The court did have control of the litigation at the time the motion was made, and the question of jurisdiction goes to the extent that the court is without authority to entertain the proposed motion. The motion was entered within 30 days after the deficiency decree complained of was entered against these defendants. Subsequently the court extended the time, and finally a petition in writing was filed, as required, and it is upon this petition and subsequent proceeding that action of the court was had.

The court allowed the plaintiff's motion to strike the petition,

The court has in the past... with the view of... THE court has... court has jurisdiction... in writing and that... court has jurisdiction... to intervene and file a petition for the vacation of the judgment... action to vacate, and was not sufficient to give the court juris-

isdiction.

as agreed that the said petition was presented to the court... must be presented in writing and supported by the facts of the case, but this is not a petition for an order; it is a petition for leave to intervene and file a petition for the vacation of the judgment... court did have control of the litigation at the time the motion was made, and the question of legal action was in the mind of the court as without authority to dismiss the proposed motion. The motion was entered with the court for the judgment... contained of the motion... The court extended the time, and finally a petition in vacation was filed, as required, and it is now this petition and judgment... presented that action at the court at law.

The court agreed that the plaintiff's motion to dismiss was dismissed.

and at the same time entered an order allowing the defendants Lucian Jarecki and Victoria Jarecki, to file an amended petition within 10 days from that date, and the plaintiff to answer within 5 days thereafter.

The question seems to be whether this order is a final one in the sense that it finally disposed of the matter that was being considered by the court. When we examine the order that was entered, we find the court only ordered that the motion of the plaintiff to strike the petition be sustained, but no dismissal has been entered, and the court at that time entered a further order granting the defendants leave to file an amended petition within 10 days. So when we come to consider the record, we believe the court had jurisdiction, and when the order was entered on February 8, 1936, denying plaintiff's motion to dismiss the defendants' amended petition filed on February 8, 1936, the court had jurisdiction to enter the order from which the defendants now appeal.

For the reasons stated, the order appealed from is affirmed.

ORDER AFFIRMED.

DENIS E. SULLIVAN, P.J. CONCURS,
BURKE, J. TAKES NO PART.

40332

IN RE ESTATE OF SAMUEL H. WEISS,
Deceased,

ABE BERKOVITZ,

(Claimant) Appellee,

v.

THE WEST SIDE TRUST AND SAVINGS BANK,
a corporation, and ROSE WEISS,
Executors of The Estate of Samuel
H. Weiss, Deceased,

(Defendants) Appellants.

APPEAL FROM

299 L.A. 620³

MR. JUSTICE HEGEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the executors of the Estate of Samuel H. Weiss, Deceased, from an order entered in the Circuit Court of Cook County allowing the claim of the claimant against the Estate of Samuel H. Weiss, deceased, for \$2,069.65, together with interest in the sum of \$728.23, making a total of \$2,797.88, to be paid in due course of administration, which claim was disallowed in the Probate Court of Cook County, Illinois.

Complying with an order entered in the Circuit Court of Cook County, the claimant filed a bill of particulars in which he alleged that on January 8, 1916, he entered into a contract with Samuel H. Weiss, deceased, whereby he was to receive the sum of \$35.00 per week, plus 35% of the net profits from one of the departments of the business of said Samuel H. Weiss, designated as "Men's and Boys' Ready-Made Clothing", and the agreement continued from year to year until the death of Samuel H. Weiss on December 10, 1929; that during said period settlements were made from time to time, and that there are two accounts - the New York Tailoring Company and the Chicago Sample Clothiers - upon which the claimant did not receive his one-fourth share of the net profits, which companies were indebted to Weiss in the respective sums of \$5,005.75 and \$3,272.90. These creditors being indebted to Weiss they conveyed

to him in payment of their accounts, two parcels of real estate in Chicago, which are referred to as the "Clark Street" and "Grand Avenue" properties.

In the latter part of July, 1939, Berkovitz and Abraham Zukerman, the latter being an employee of Mr. Weiss for 31 years, visited Weiss who was ill at home. Mr. Berkovitz told Weiss that he had eight hundred some odd dollars due him on the Chicago Sample Clothiers account and twelve hundred some odd dollars due him on the New York Tailoring Company account. Mr. Weiss then said that the account showed in the books; that he would be down in a week or ten days and give Berkovitz credit for it in full. He never returned to the business after that conversation. Upon the death of Weiss, Berkovitz filed his claim in the Probate Court in the sum of \$3,069.65, being 25% of the sum due and owing on the two accounts - the Chicago Sample Clothiers and the New York Tailoring Company.

Upon the trial of the cause in the Circuit Court, which is here on appeal, the estate offered no evidence. After a hearing, and after the presentation of arguments, the court entered a judgment in favor of the claimant in the sum of \$3,065.65, together with interest for \$728.33, making a total of \$3,797.88 to be paid in due course of administration.

The errors relied upon for reversal by the executors of the Estate of Samuel H. Weiss, Deceased, are: (1) The court erred in holding that the claimant was a competent witness to prove the books of account maintained in the business of Samuel H. Weiss, Deceased; (2) the court erred in admitting the books in evidence without proof that such books were true and correct; and (3) the court erred in allowing the claim of Mrs. Berkovitz in the face of the evidence which conclusively established that Berkovitz's interest, involved in the claim liquidated by the acceptance of the real estate, was joint

to him in regard to the same, and he said that he would

also be referred to as the "Black" and "White"

of the same.

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ownership of said real estate with the deceased, Samuel H. Weiss.

As to the point made by the executors of the estate that the claimant was not a competent witness to prove the books of account in question, Sec. 3, Ch. 51, Ill. St. Stat. 1937, provides that:

"Where in any civil action, suit or proceeding the claim or defense is founded on a book account, any party or interested person may testify to his account book and the items therein contained; * * * that the entries therein were made by himself and are true and just, or that the same were made by a deceased person in the usual course of trade, and of his duty or employment to the party so testifying; and thereupon the said account book and entries shall be admitted as evidence in the cause."

This court in passing upon the competency of a witness in the case of Miller & Graves v. Fratz, 179 Ill. App. 204, said:

"Section 3 (of this act) we regard as an independent provision, having no reference to either sections 1 or 2. We are of opinion that it was meant thereby to provide that in all cases a party may testify as therein stated to the extent necessary to admit his books in evidence. If it had been intended that such evidence could not be given to the books by an interested party where the adverse party acted in a representative capacity, then there was no need to adopt section 3 at all, or where section 3 said that the party could not testify 'by virtue of the foregoing section' it should have read 'by virtue of the foregoing or the succeeding sections'."

Then again this court in the case of McGlasson v. Housel, 127 Ill. App. 380, upon a like question, said:

"The first section (of the act) treats of the general competency of interested parties and of parties who have been convicted of crime. The second section limits the general competency created 'by virtue of the foregoing section' (these being its own words) by excepting certain cases where the adverse party sues or defends in certain representative or fiduciary capacities. But to these excepted cases are made in distinct paragraphs certain exceptions in which such general competency provided for by the foregoing section is declared still to exist.

These two sections, as it seems to us, were independent of the third section, which enlarged the common law rule concerning account books by allowing such books to be proven as well by the oath of an interested party as by the oath of a disinterested one."

So from the provision of this section to which we have referred it would seem that it was not error for the court to permit the claimant to testify regarding these books of account.

The defendants contend that the evidence was insufficient to admit the books of account in evidence under Section 3, Ch. 51, which we have discussed.

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The claimant identified the account books of the decedent, Samuel H. Weiss, which were used during his lifetime in the usual course of business at his place of business at 624 Roosevelt Road; that the books were kept "in the safe in the business of Samuel H. Weiss and in the desk during the day", and were there at the time of his death, and were the "only books that were kept" of his transactions.

From an examination of the evidence, we think the trial court was fully justified in permitting the books of account to be received in evidence. We must bear in mind that the amount claimed by the claimant in this proceeding was not disputed. But the defendant to this claim contends that the claim of the claimant is not provable against the estate of Samuel H. Weiss, deceased, for the reason that from the evidence it appears that the amount due was between the parties as partners. To determine this question it is evident from the record that during the years the claimant was working for Weiss he was being paid at the rate of \$35.00 a week, together with 35% of the net profits from one of the departments of the business of Samuel H. Weiss, designated as Men's and Boys' Ready-made Clothing", and the claimant continued in the employment of and was paid by Samuel H. Weiss upon that basis.

It is evident there were two claims due, one from the New York Tailoring Company amounting to \$5,005.75, and the other from the Chicago People Clothiers, amounting to \$3,272.80, making a total of \$8,278.55, and that in settlement of these claims Mr. Weiss accepted the deeds conveying to him the real estate referred to in the proceeding, and it further appears that subsequent to that time when an inventory of the estate was filed, the property was inventoried in the name of Samuel H. Weiss, deceased, as owner and there is no evidence in the record which would indicate that there was any contention at any time during the lifetime of Mr. Weiss, or by the

[illegible]

executors of the estate after his death, that the amount claimed by the claimant was a partnership matter and would have to be established in a partnership accounting. The books which were introduced in evidence, do not tend to prove that there was a partnership existing between Mr. Weiss and the claimant. Further, by the contract, which was in force between the parties and under which the parties continued to operate subsequent to the expiration of the time, it is provided in paragraph one that all payment for merchandise shall be made by Samuel H. Weiss and that "all of such articles purchased shall be the absolute property of the said Samuel H. Weiss." In the third paragraph it is provided that A. Berkovitz shall not enter into any contract for his time of any nature or description "while in the employ of the said Samuel H. Weiss," and further reference is made to the contract as "this agreement of employment". The last paragraph provides: "that this contract is not to interfere with the business of the said Samuel H. Weiss." The cover of the agreement refers to the same as "Agreement of Employment between Samuel H. Weiss and Abe Berkovitz."

The question of whether the contract constituted a partnership between the parties is a question of intention to be gathered from the terms of the contract. Goucher v. Bates, 280 Ill. 375, and in Smith v. Knight, 71 Ill. 142. The case of Smythe v. Evans, 303 Ill. 376, which has been called to our attention, seems to be in point. In this case a claim was filed in the Probate Court based upon an agreement whereby an engineer was to receive one-half of the profits arising from a contract as compensation from a contractor, one of the contentions being that there could be no recovery in a suit unless there was a settlement of the partnership affairs. The court said:

"The eighth instruction proceeds on the theory that if the jury find, from the evidence, that there was a partnership between Evans and Smythe, then there can be no recovery in this suit

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UNITED STATES DEPARTMENT OF THE INTERIOR
FOR THE YEAR 1900

unless there was a settlement of the partnership affairs in the lifetime of Saythe. There was nothing in the evidence on which to base this instruction. Claimant's contention was, that he was to be paid for his services one-half of Saythe's profits. This would not make them partners. Burton v. Deodanis, 83 Ill. 237."

From the evidence, all of which is consistent with the written contract of employment, there remains no doubt that Weiss was the sole owner of the assets of the business, including the real estate, and that Berkovitz was entitled as an employee to his salary and aliquot share of the profits. There is nothing contingent or uncertain about the claim, and we believe the claim for the amount suggested by the claimant is borne out by the evidence.

As we have previously stated, it depends largely upon the intention of the parties as to whether the claimant was a partner of Samuel H. Weiss, and from the facts as they appear in the record, we are of the opinion that the claimant was an employee of Mr. Weiss at the time of the business transaction and that he was entitled at the time of the death of Mr. Weiss to the sum of \$2,000.00, being 25% of the sum due and owing on two accounts - the Chicago People Clothiers, and the New York Tailoring Company - with interest in the sum of \$738.73, making a total of \$2,738.73 to be paid in due course of administration.

For the reasons stated, the judgment is affirmed.

JUDGMENT AFFIRMED.

DENIS E. SULLIVAN, P.J. CONCURS,
BURKE, J. TAKES NO PART.

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1. The first group of people who are not in the majority are the people who are not in the majority.

40382

GLENN THOMPSON and MILDRED B.
THOMPSON,

(Plaintiffs) Appellants,

v.

FLORENCE OTIS, WEBBER CARTAGE LINE
INC., a corporation, and EDWARD E.
KLEINSCHMIDT,

(Defendants) Appellees.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

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299 I.A. 620⁴

MR. JUSTICE REBEL DELIVERED THE OPINION OF THE COURT.

The plaintiffs by this appeal seek to reverse a judgment entered February 25, 1938, on the verdict of a jury finding the defendants not guilty of the charges of negligence laid against them in the separate complaints of plaintiffs Glenn Thompson and Mildred B. Thompson, his wife.

The actions grew out of a three-way motor vehicle accident, which occurred on March 24, 1933, on Route 42, or Sheridan Road, at the north limits of the Village of Lake Bluff, between Chicago and Waukegan, in which plaintiffs were seriously injured.

The two cases were consolidated and tried together as one case, with one series of instructions, but each defendant was represented by separate counsel. The court overruled a motion for a new trial and entered judgment on the verdict.

As we have stated, these two cases were consolidated, and tried upon an amended complaint wherein Edward E. Kleinschmidt was made an additional defendant. The plaintiffs were riding as guests in the car driven by Kleinschmidt and it is alleged that they were in the exercise of due care and not guilty of any contributory negligence.

The complaints in the two cases were the same as to the charges of negligence, and the negligence as to injuries, while variant, are not material here. No point has been made by the

defendants as to the pleadings, so that the questions here involved are questions of fact, and from the statements made by the several parties interested in the subject matter it would seem that many of the questions of fact are controverted. However, in stating the facts it appears that on the evening of March 24, 1933, the defendant Florence Otis, since married and known as Florence Otis Wetzer, spent the evening at the apartment of Gordon Jones, at 1120 Lake Shore Drive, Chicago, where a dinner party was served to the Misses Florence Otis, Dorothy Senn and Barbara Senn, Oevereux Bowley, Gordon Jones and Paul Anderson. Just before the buffet dinner cocktails were served and Miss Otis, with others, joined in the refreshments, she drinking one cocktail. About 8:00 o'clock P. M. the party left the apartment to go to a skating rink at the Naval Training Station, north of the Village of Lake Bluff, which could be reached by driving up Sheridan Road from Chicago. They left in two automobiles, one a Ford coupe owned and driven by Florence Otis, and the other a Buick roadster driven by Gordon Jones. In the Ford with Miss Otis were Barbara Senn and Paul Anderson, the latter riding on the outside of the seat and Miss Senn in the middle. Dorothy Senn and Bowley rode in the Buick roadster with Jones. The parties in the Ford stopped for about fifteen minutes at Highland Park at the Moraine Hotel. After leaving the hotel they drove up to Lake Bluff, about a mile, and overtook the Buick under the viaduct, where Jones and his party had stopped to wait for the Ford. The drivers of the two cars agreed that the Buick would precede the Ford to show the way to the entrance of the Naval Training Station skating rink. As the two cars started north from the viaduct they followed a Webber Cartage Line, Inc. truck for about a quarter of a mile, the Ford traveling immediately behind the Buick, 100 to 150 feet, according to Miss Otis and Paul Anderson, and according to

determined as to the location, by the fact that the witnesses were located
 the question of fact, and upon the statements made by the witnesses
 decided in favor of the witness who is now before the court.
 of the evidence it is not the duty of the court to disregard the
 facts it is known that on the evening of March 14, 1902, the witness
 Clarence Galt, since married and known as Clarence Galt Wicker,
 spent the evening at the apartment of certain person, at 1110 Lake
 Street, Chicago, where a dinner party was given to the witness
 Clarence Galt, Wicker, and other persons, including Wicker,
 Gordon Jones and Paul Anderson, last before the witness named
 Wicker, were present and also Galt, who appears, named in the
 testimony, the drinking and smoking. About 11:30 o'clock P. M.
 the party left the apartment to go to a meeting room at the Hotel
 Tremont Station, north of the Illinois or Lake Street, which would
 be reached by driving up Madison Street from Chicago. They left
 in two automobiles, and a third car was owned and driven by Clarence
 Galt, and the other a black coach driven by Gordon Jones. In
 the car with Galt were Gordon Jones and Paul Anderson, the
 latter riding on the outside of the car and also seen in the photo.
 Dorothy Hunt and Evelyn Hunt in the black coach with Jones. The
 parties in the car returned the about fifteen minutes or less
 back at the same hotel. After leaving the hotel they drove
 to Lake Street, about a mile, and overtook the car under the
 witness, where Jones and his party had stopped to wait for the car.
 The driver of the two cars agreed that the witness would transfer the
 bond to each and go to the entrance of the Hotel Tremont Station
 walking north. As the two cars started north from the witness they
 followed a narrow passage line, the same few days a number of
 a mile, the two cars following immediately behind the witness, but in the
 last, something like five or six miles, and reaching at

Jones about 25 to 50 feet. The truck was traveling north in the northbound lane of the 18 foot concrete highway at a speed of from 15 to 20 miles an hour. The Buick car passed the truck, Jones driving at 20 to 25 miles an hour, and the truck going about 18. Miss Otis passed the truck right behind the Jones car a distance of 25 or 50 feet. When Jones passed the truck he was going 20 to 25 miles an hour, which was faster than the truck was going. The Otis car was driven at an average speed of about 25 miles an hour. A heavy wet snow was falling and windshield wipers were working on the cars. The pavement was wet as the snow was melting as it fell.

Just north of Lake Bluff two driveways lead off Sheridan Road into the Crabtree farm. It is 263 feet from the north side of the north driveway to the north side of the south driveway. On the opposite side of the hard road near the south entrance there was a telephone pole which was 120 feet south of the next immediate post to the north. Another telephone post stood on the opposite side of the hard road near the north entrance which was 301 feet from the post at the south entrance.

On the same evening about 10 o'clock the defendant Edward E. Kleinschmidt, with his niece Milda, and the plaintiffs, Glenn Thompson and his wife Mildred, as guests, left the Naval Training Station skating rink in Kleinschmidt's twelve-cylinder four-door Cadillac sedan to drive to Highland Park, where Kleinschmidt lived, and where plaintiffs had left their car upon joining the Kleinschmidts to go to the skating rink. On their way home Kleinschmidt was driving, Glenn Thompson was at his side on the right of the front seat, Mrs. Thompson was in the back seat directly behind the driver and Milda Kleinschmidt was seated beside Mrs. Thompson. They left the skating rink at 10:05 o'clock, or thereabouts. It was snowing and the temperature was raw and cold. Double windshield wipers were working

on the Kleinschmidt car and the windshield was clear of snow all the way across.

As the Kleinschmidt or Cadillac car came over the crest of the hill near the north entrance to the Crabtree farm where the buildings are located, the Cadillac and the Ford coupe, driven by Miss Otis, came in contact. The first the occupants of the Cadillac car of the Ford was when its headlights were approximately opposite the left front fender of the Cadillac. Prior to the contact between the Ford and the Cadillac, the Buick roadster met and passed the Cadillac without any trouble. Mr. Jones, the driver, fixed the speed of the Buick at 20 to 25 miles an hour at and immediately prior to the accident, and the Ford coupe was going about the same, directly behind the Buick about 25 feet, and Mr. Jones could see through his rear mirror that the Ford was following. The contact of the Ford and the Cadillac occurred almost within a second or two after the Buick and the Cadillac passed each other. When the Cadillac and the Buick met and passed, the Cadillac was almost on the center of the road, and just a little north of the crest of the hill. After it passed the Buick, Jones heard a click, looked in his rear view mirror and saw the Otis Ford coupe proceed north about fifteen feet, and slowly veer off to the left or west. Jones stopped his car and ran back to the Ford and then down to the place where the Cadillac and truck had collided, which was about 100 feet from the place where the Ford was standing.

When the Ford and Cadillac came in contact the left front wheel of the Ford was broken so that it ended up in a ditch on the west side of the road near a telephone pole, but it did not strike the pole. After the contact the Cadillac took a southeasterly course across the east or northbound lane, and came in collision with the Webber Cartage Line's truck. The right sides of the front of the

on the right-hand side of the road and the other on the left.

The first car.

As the car approached the intersection it was seen that the road

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Cadillac and the truck came together. Immediately thereafter the Cadillac burst into flames and Mr. Anderson, who was in the Ford and Mr. Bowley, who was in the Buick, rushed down to the collision, crawled in the back seat and helped drag Mr. Thompson out. After the collision between the truck and the Cadillac the right front wheel of the truck was pushed back three or four feet from normal position and up under the truck, breaking the battery box and putting out all the lights of the truck. The front axle of the truck was broken and pushed back underneath the motor. The truck bumper was detached and was on the right side of the Cadillac, between the right fender and the hood. The Ford was from 75 to 100 feet distant from the place of the truck and the Cadillac collision, and visibility that evening was bad, and the truck driver could see only about 50 feet ahead, so that when the Ford was 50 feet ahead of the truck he could not see it. The condition of the weather prevented the truck driver from seeing the Cadillac when it was coming over the top of the hill. The truck driver did not see the headlights of the Cadillac as it came over the hill, but saw them on his side of the road when they were within five or six or ten feet from him. He had on the dim lights of the truck, but had had the bright lights on, the truck being equipped with a button to step on to dim them, by throwing the bright lights up or down. He had not seen the Cadillac coming before the Ford got out of his vision. The trailer and truck together was about thirty feet long and was loaded with boilers and conveyors and was being driven with the overdrive on. The truck and trailer weighed about 41,700 pounds and the load about 17,000 pounds. With that load the truck was approaching the place of the collision at a speed of 15 to 20 miles an hour. At the time the Ford passed the truck the truck was going 20 to 25 miles an hour, according to the truck driver, and the Ford's speed in passing was about thirty miles an hour. When the Ford attempted to get back on

The collision between the truck and the Cadillac was right front
 wheel at the front end; and the truck was then lost from control
 position and up under the truck, striking the engine and the
 front end of the truck. The front end of the truck was
 detached and was on the right side of the Cadillac, between the
 right front and the back. The front end of the truck was
 from the place of the truck and the Cadillac collision, and
 actually that evening was not, and the front driver door was
 about 20 feet ahead, so that with the light on the left side of the
 truck he could not see it. The Cadillac at the moment was
 the front right front wheel the Cadillac was at the front end
 the top of the hill. The truck driver did not see the headlights of
 the Cadillac as it came over the hill, but saw them on his side of
 the road when they were within five or ten feet from him. He
 had on the left side of the truck, but had not the right lights
 on. The truck being equipped with a button to stop on its horn,
 by throwing the right lights on or down. He had not seen the
 Cadillac coming before the front end of his vehicle. The driver
 and front right wheel was about thirty feet from him and was facing him.
 lights and emergency and was being driven with the emergency on.
 The truck and Cadillac weighed about 21,000 pounds and the load about
 14,000 pounds. With that load the truck was overloading the front
 at the collision at a speed of 15 to 20 miles an hour. At the time
 the truck passed the truck the truck was going 20 to 25 miles an hour,
 according to the truck driver, and the truck's speed in passing was
 about thirty miles an hour. When the truck passed he was back on

the east side of the road the right front of the car almost came in contact with the left side of the truck.

Immediately prior to the contact between the Ford and the Cadillac, Kleinschmidt was hugging the center line of the road and driving from 40 to 45 miles an hour. He was 38 years old and had been near-sighted from youth but wore glasses to correct the vision. He testified that he could stop his car at that time within 20 to 30 feet and 40 feet on that pavement, and that he did not apply his brakes with full force for fear of skidding, and went about 50 feet after the contact with the Otis car before it struck the truck, and Mr. Kleinschmidt testified that his car had not come to a rest when it collided with the truck.

In this accident the plaintiff Glenn Thompson was seriously injured, and by this litigation he seeks to recover damages.

Reciting the facts as called to our attention by the plaintiffs, and examining the briefs that were filed by the defendants, we find there was a controversy upon practically every question of fact, and this, of course, necessitates the recital of facts as suggested by the defendants.

Our attention has been called to the statement of Mrs. Petzer regarding the facts. She states she was driving her car some distance back of the Buick car before the collision; that she had passed the truck and was able to see the center line of the road all the time; that after passing the truck, Mrs. Petzer drove back on the right side of the center line of the highway and continued north. The helper on the Webber Cartage Company truck saw the Petzer car pass the truck somewhere in Lake Bluff. After it passed the truck, he saw it get back on the east side of the road and continue north in that position. He watched it as far as he could see, and all of the time it was within his vision it was on the right side of the road. Benson, the driver of the Webber Cartage Company truck, saw the Ford

the east side of the road the right front of the car almost came in

contact with the left side of the truck.

Immediately after it was contacted between the two cars the

trucks, immediately after leaving the contact line of the road and

leaving them to go on their way. The car 20 yards and the

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pass the truck and get back on its own side of the road. The last he saw of the Ford it was going north on its own side of the Highway.

After passing the truck, Mrs. Fetzner first saw the lights of the Cadillac car approaching from the north about 300 feet away from her, and that the Cadillac car was travelling at a speed of from 35 to 45 miles per hour, and was travelling with its left wheels on the center line of the road. Mrs. Fetzner was driving on the right side of the center line of the road within a foot or so of the edge of the road. As the Cadillac neared the Ford it veered to the left side of the highway and struck the left front wheel of Mrs. Fetzner's car, and at the moment of the collision, according to the evidence of Glenn Thompson, himself, "either Mr. Kleinschmidt's car was on the line or just a little over it". As a result of the collision the left front wheel of the Ford was broken. The Ford travelled north a few feet, and then turned to the west side of the road and went in the ditch. After the collision the Cadillac travelled south a distance of from 75 to 175 feet, and it was at this point that the collision between the Cadillac and the truck occurred. The men on the truck testified that they were travelling about 15 miles an hour and saw the headlights of the Cadillac car coming diagonally toward them 40 to 50 feet away.

The Cadillac was a big heavy automobile weighing approximately 6,000 pounds. It was equipped with efficient four-wheel air-brakes which operated at a very slight touch of the brake pedal.

There is a dispute between the witnesses as to the speed of the Kleinschmidt car. The plaintiffs contend that the defendant was driving his car at an excessive speed - 40 miles an hour - and rely upon this allegation to show wilfulness and wantonness. Mrs. Thompson, the wife of the other plaintiff, testified that the Kleinschmidt car was travelling at a speed from 30 to 35 miles an hour. So that when we come to consider all the facts as we have

detailed them at some length, it was for the jury to determine as to the liability of each of the defendants for damages sustained by the plaintiffs.

The instructions that the plaintiffs contend were part of the record in this case appear in the additional record, which the plaintiffs filed by permission of this court. Upon an examination of the additional record we find it is certified to by the Clerk of the Superior Court of Cook County, as a transcript of the refused and given instructions. These instructions do not appear to have been endorsed "given" or "refused" by the judge before whom the proceeding was had; nor objections made to the giving and refusal of them. As to whether the instructions must be marked as indicated, it is provided by the Practice Act, Ch. 110, Par. 131, Sec. 67, 111. Rev. Stats. Bar Assn. Ed. as follows:

"The court shall give instructions to the jury only in writing and only as to the law of the case. When instructions are asked which the judge cannot give, he shall, on the margin thereof, write the word 'refused', and such as he approves he shall write on the margin thereof the word 'given', and he shall in no case, after instructions are given, clarify, modify or in any manner explain the same to the jury, otherwise than in writing."

And it is to be noted from the language used in this provision of the statute that the instructions shall be marked as indicated in the provision.

It further appears that the instructions in the additional record were not certified to by the court before whom the case was tried. Ch. 110, Par. 198, Sec. 74 (2) provides:

" * * * The trial court record shall include every writ, pleading, motion, order, affidavit and other document filed or entered in the cause and all matters before the trial court which shall be certified as a part of such record by the judge thereof. All matters in the trial court record actually before the court on appeal may be considered by the court for all purposes, but if not properly authenticated the court may order such further authentication as it may deem advisable."

and in order that this court may consider the instructions, it is necessary that they be properly certified to by the trial judge

before whom the case was heard. There is a reason for the necessity of certification of the items as a part of the record. This court is informed by this certification of the judge that the matters called to the attention of the appellate court were properly before the trial court. From these provisions of the statute it is clear that the additional record is not such as this court can consider in disposing of the questions regarding the instructions.

The Supreme Court in the case of Greenwell v. Hess, 298 Ill. 459, upon this question, said:

"It is the well established rule in law cases, that in order to be preserved as a part of the record, all motions, including motions for a new trial and in arrest of judgment, and all the instructions given and refused by the court, must be preserved in a bill of exceptions signed by the court and filed as a part of the record in the case. Under our present Practice act the same might be preserved by a stenographic report signed by the trial judge, but they cannot be copied into the record by the clerk as part of the record to be considered on a review of the judgment unless contained in such bill of exceptions, certificate of evidence or stenographic report" * *. In the absence of a bill of exceptions or certificate of evidence in such cases in chancery, or of a stenographic report signed by the trial judge and made a part of the record and containing the motion for a new trial and the instructions of the court refused and given, no question can arise in a court of review on the sufficiency of the evidence to support the verdict or on error assigned for the giving or refusing of instructions. Packer v. Cole, 188 Ill. 150; Johnson v. Farrell, 215 id. 542."

Upon a like question this court in Janelunas v. Chicago Fraternal Life Ass'n, 286 Ill. App. 219, said:

"The clerk has erroneously inserted in the common law record documents which he designates as instructions 'refused' and instructions 'given', but at whose instance they were submitted does not appear. Nor is it anywhere stated that such instructions were all the instructions offered, given, or refused. The proper place for instructions under the Civil Practice Act, is in the report of the proceedings on the trial and not in the common law record. No question based on the instructions is saved."

And then again in Burns v. Kuns, 270 Ill. App. 278, the court said:

"The evidence is not preserved in the record, but the given and refused instructions are erroneously incorporated in the common law record. The proper place for instructions is in the report

of the proceedings of the trial; they have no proper place in the common law record. (Janselma v. Chicago Fraternal Life Ass'n, 286 Ill. App. 219.) "Since there is no evidence in the record the instructions cannot be considered."

Finally, it appears that the instructions called to our attention by the plaintiffs and contained in the additional record are not properly preserved in order to be considered by this court upon the question of whether or not they were properly submitted to the jury. As we have indicated, the instructions, so-called, are not marked "given" or "refused"; the record is not certified to by the trial judge who heard the matter, and the additional record is not such as to comply with the statutory provision. Therefore, this court is unable to consider such record.

The only question before the court is whether the judgment is against the manifest weight of the evidence. As we have already indicated, the questions were properly submitted to the jury for their consideration, and from their conclusion upon the facts as they appear, we cannot say the verdict is against the manifest weight of the evidence.

For the reasons stated in this opinion, the judgment is affirmed.

JUDGMENT AFFIRMED.

DENIS E. SULLIVAN, P. J. CONCURS,
BURKE, J. TAKES NO PART.

40484

PEOPLE OF THE STATE OF ILLINOIS,
(Plaintiff) Defendant in Error,

v.

PETER BOHR,

(Defendant) Plaintiff in Error.

ERROR TO

APPELLATE COURT

OF ILLINOIS.

288 1A 621

MR. JUSTICE NEBEL DELIVERED THE OPINION OF THE COURT.

This proceeding is in this court upon a writ of error issued in relation to the defendant, who submitted the cause to the court. After due consideration the court found the defendant guilty and entered an order requiring him to pay \$7.00 per week for a period of one year for the use of the child.

The proceeding was brought upon an information signed by Bertha Bohr complaining of Peter Bohr and filed on June 18, 1938, charging the defendant with having on June 18, 1938, without reasonable cause, neglected and refused to maintain and provide for his wife and for Marilyn, a minor child under the age of 18 years, his daughter, both being in necessitous and destitute circumstances. A jury was waived by the defendant when the case was submitted to the court, and the order appealed from was entered as we have stated.

The prosecution has failed to aid the court by filing a brief in answer to that submitted by the defendant, and therefore we will consider the matter as presented.

From the record it appears that Bertha Bohr, the complaining witness, was divorced from the defendant, her husband, about seven years prior to the date of the hearing. The decree was obtained by her in Saukago, Illinois, and contained no provision for alimony or support. During the two and one-half years prior to the date of the hearing, the wife testified that she had received \$5.00 a week from the defendant for the support of the child. She testified further that she operated a beauty shop in one room of her residence

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and that she had supported and maintained the child since its birth with the help of her parents. She further testified that the child was ill and needed medical attention. It also appears that the defendant offered to have the child examined and if ill, pay all the expense of the required attention. The complaining witness in testifying, however, made the statement that she had a good physician of her own, and that she had a home for her child; that the child was being well fed and was in no need. The defendant at the time of the trial was earning an average of \$33.00 a week, and had not been earning an average of \$38.00 since January 1, 1938. He testified that he had been sending the complaining witness \$5.00 a week, and a few days prior to the hearing had sent her \$7.00 for the support of the child.

On July 5, 1938, the court found the defendant guilty as charged in the information, and ordered that the defendant pay \$7.00 per week for one year for the support and maintenance of the child, the first payment to be made July 5, 1938, and further ordering that the cause be postponed and set for trial August 16, 1938.

The action is based upon Ch. 68, Par. 24, Sec. 1, of the Illinois Revised Statutes, 1937, wherein it is provided:

"That every person who shall, without any reasonable cause, neglect or refuse to provide for the support or maintenance . . . of his or her child or children under the age of eighteen years, in destitute or necessitous circumstances shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by a fine of not to exceed six hundred dollars or by imprisonment in the county jail, house of correction or workhouse, not to exceed one year, or by both such fine and imprisonment."

The statute further provides by Par. 36, Sec. 3:

"At any time before the trial, upon motion of the complainant and upon notice of the defendant, the court at any time or a judge thereof in vacation, may enter such temporary order as may seem just, providing for the support or maintenance of the wife or child or children of the defendant, or both, pendente lite, and may for violation of such order punish the offender as for a contempt of court."

And again, the statute provides by Par. 28, Sec. 5:

"If the court be satisfied by testimony in open court, that at any time during said period of one year the defendant has violated the terms of such order, it may forthwith proceed with the trial of the defendant under the original charge, or sentence him or her under the original conviction, or enforce the suspended sentence, as the case may be. " * * "

So that when we examine the record we find the court's order is that the defendant is guilty and the cause is continued for the purpose of a further hearing, and from a consideration of the matter pending here in this court we find that the court has entered an order finding the defendant guilty and a temporary order that he pay \$7.00 for one year for the support of his child.

The defendant contends there is no evidence that the child is in destitute or necessitous circumstances; that on the contrary the evidence appears to be that the child is well taken care of, and that the purpose of this proceeding is to compel the defendant to continue the payment of \$7.00 per week, which was increased from \$5.00 and voluntarily paid by him for two and one-half years. Although the facts seem to support the defendant's position - People v. Yennier, 317 Ill. 531, this court is unable to consider the question, since no order that was final in its nature was entered - the matter, as we have intimated, having been continued for further consideration by the court.

Upon the grounds stated, the writ of error is dismissed.

WRIT DISMISSED.

DENIS E. SULLIVAN, P.J. CONCURS,
BURKE, J. TAKES NO PART.

Journal of Management Education 30(6)p.789-804

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ALBERT CERVENKA,
Appellee,

vs.

LAWDALE NATIONAL BANK, a Corporation,
FRANK M. JIRACEK and LAWDALE AGENCY
AND LOAN CORPORATION, a Corporation,
Appellants.

APPEAL FROM CIRCUIT COURT

OF COOK COUNTY.

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258 T.A. 621²

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

June 30, 1936, plaintiff sued to recover damages for alleged false representations through which he was induced to buy certain notes secured by a mortgage on real estate in Cook county. This and an amended complaint were stricken on motion of defendants. November 15, 1937, plaintiff filed a third amended complaint which defendants made a motion to strike. This was denied, and defendants answered denying the alleged fraudulent representations which included a promise to guarantee the payment of the notes. There was a trial by the court and a finding for plaintiff in the sum of \$6000 with judgment, from which defendants appeal.

It is urged for reversal that the complaint was inconsistent in that it alleged not only fraudulent statements relied upon by plaintiff but also a promise of guaranty. The defendant bank points out that any promise of guaranty on its part would have been ultra vires, and all the defendants urge that the evidence of the alleged guaranty as well as false representations were insufficient. They also assert that the proof failed to show damages to the amount of the judgment, or in any other amount, and urge plaintiff's decision to rescind was not promptly made and that the third amended complaint did not state a cause of action. The contention that plaintiff could not join in one suit claims for damages based on a guaranty and damages sustained through fraud and deceit is not available in this court. The question was not raised by motion nor answer in the trial

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court, as required by section 48 of the Civil Practice act (Smith-Hurd Anno. Statutes, chap. 110, par. 172, p. 390.) It, therefore, the complaint was defective in this respect the defect was waived. Hitchcock v. Reynolds, 273 Ill. App., 559. The complaint substantially is for fraud and deceit to which an averment of a guaranty by a corporation without legal power to make such guaranty (People v. First State Bank & Trust Co., 304 Ill., 254; Mass v. Madison and Redzie Bank, 304 Ill., 254; Awatin v. Atlas Exchange Bld'g Bank, 275 Ill. App., 530) would not be altogether inappropriate.

The controlling question in the case is raised by the contention of defendants that the evidence offered was insufficient to establish either a promise of guaranty or fraudulent representations. Three witnesses testified in behalf of plaintiff, the plaintiff himself, his daughter (Mrs. Kaiman) and an investigator of tax records, Mr. Berkman. Frank M. Jiracek was the only witness for defendants. The evidence shows that plaintiff is Bohemian by nationality and about 78 years of age; he is not unacquainted with the English language. Jiracek in April 1931, was the manager of the defendant Lawndale Agency and Loan Corporation, which was engaged in the business of selling securities. Plaintiff had dealt with the corporation for a number of years and was known to Jiracek for about 15 years. Defendants (the agency and the bank) were located close together in the same building, but Jiracek was not officially connected with the bank. Plaintiff testifies he said he represented the bank but ^{he} denies this and there is no proof that he had any direct connection with it.

April 9, 1931, plaintiff bought from defendant agency the securities in question, six notes secured by mortgage on property known as 3334 Crenshaw avenue. He paid therefor (as a written statement of the sale signed by him shows) \$6012. The property was owned by S. Morowitz. Plaintiff testifies - and on this point is

corroborated by his daughter - that he went to the agency in response to a letter dated March 15, 1931, signed by the agency in the name of Jiracek. He could not produce the letter, saying that when he visited the agency he left the letter with Jiracek. Jiracek denies that he sent any such letter to plaintiff. Plaintiff says that when he received the letter he went to the bank, saw Jiracek and asked him whether the mortgage was good; that Jiracek said, "In case of any trouble comes up that they are willing to return my principal and interest due on that mortgage." Plaintiff also testified that Jiracek said the property was in very good condition, was rented, paid good, and there was money left over to lay aside. He says he turned in other bonds owned by him and took these in trade. The deal was made April 12th but he had been in to see Mr. Jiracek two or three days prior to that time; he says that previous to the day of the sale he walked into the office of the agency and told them he wanted to buy some mortgage notes. The first interest fell due October 1, 1931. He took the coupons to the bank and to the cashier. \$180 was due and there was not enough money to pay it; he saw Mr. Jiracek who told him he should give the owner a chance; that there were a lot of vacancies in the property, and told him to come back later; he returned many times; about the middle of October, 1931, he received \$60; he visited the owner of the mortgaged property, Mrs. Morowitz, but did not receive any more money.

Plaintiff's daughter, Mrs. Raiman, testifies that she opened and read to her father the letter of March 15, 1931; that this letter said they had a mortgage at the bank and that it was a guaranteed mortgage, and that they would like to see plaintiff about it; she says the letter mentioned 3834 Gresham Avenue. Mrs. Raiman also says that she was present April 12, 1931, and heard the talk with Jiracek who said the mortgage was guaranteed and that if anything should happen to the bonds, "they will pay him in full and his

corrected by his daughter - that he went to the agency in response
to a letter dated March 10, 1931, signed by her name in the name of
himself. He could not remember the letter, saying that when he
visited the agency he told the Agent that himself. General Service
that he sent my name letter to himself. Assistant says that when
he received the letter he went to the bank, saw himself and told him
whether the mortgage was good; that himself said, "on one of my
trouble cases he that was willing to remove my mortgage and
interest and on that mortgage. I distinctly have testified that
himself said the mortgage was in very good condition, the money
said good, and there was money left over to his child. He says he
turned in when he was owned by him and took care in bank. The bank
was made and that was the last time he saw it. Himself said at
three days after to that time; he says that himself to the day of
the wife he talked to the office of the agency and told him he
wanted to buy some mortgage notes. The time himself told the
October 1, 1931. He took the mortgage to the bank and to the office.
HIMSELF was the one there was not enough money to pay it; he says it.
Himself told him he should give the money a chance; that there
were a lot of vacancies in the mortgage, and told him to come back
later; he himself was placed under the right to himself, that he
himself was; he placed the money of the mortgage mortgage with
himself, and that was himself not very much.
HIMSELF'S MORTGAGE, 1931. Himself, 1931 to 1931 (same)
HIMSELF was the one that the letter to himself, 1931; that was
that time and a mortgage of the bank and that it was a mortgage
HIMSELF, and that they would like to see himself about it; and
with the letter mortgage HIMSELF 1931 to 1931. HIMSELF was
HIMSELF was the mortgage 1931 to 1931. HIMSELF was the mortgage
HIMSELF was the mortgage 1931 to 1931. HIMSELF was the mortgage

interest." She says the exact language was, "Mr. Cervanka, I have a very good mortgage which is guaranteed." She says her father replied that this was all the money he had and Jiracek said, "Yes, you don't have to worry about it." She also says that Mr. Jiracek said the house was fully rented, taxes paid and there was enough income from the building that they could pay the interest and lay money aside for the principal; she also said she was present when her father went to the cashier in October, and the cashier told him there was no money, and he then went to Mr. Jiracek who told him he would have to wait awhile, that there seemed to be vacancies in the building; that she went with him again to the bank in October when he was paid \$60; in the latter part of 1931 they visited the property and talked with the owner; three of the flats were vacant, the lights were torn out from the walls, the plaster was coming down and the roof was leaking.

Mr. Berkman's testimony is to the effect that he is employed by the Title Research Corporation and made a search of property located at 3634 Grenshaw Avenue, found the taxes for 1928 amounting to \$498.72 were paid by the owner June 16, 1930; that the taxes for 1929 were \$579.97, and that on October 1, 1931, there was a payment on account by the owner of \$284.76. There was a forfeiture for taxes on November 2, 1931. The taxes for 1930 amounted to \$632.87 and nothing was paid on this. He said there were no delinquent taxes on April 9, 1931. The 1929 taxes did not become delinquent until May 15.

September 14, 1931, plaintiff deposited the securities in question with the ~~Lawndale~~ Lawndale State Bank as depository, signing in that connection a letter of transmittal and deposit. It describes the securities and states that the same are deposited pursuant to the terms of the Mortgage Holders Protective Agreement dated November 30, 1931, which apparently was intended to conserve

interest. The very first thing I saw, "Mr. Bernstein, I have
a very good knowledge of the "business", and I can tell you
that this was all the money he had and I think, "Yes",
but I don't want to say more than that. The money was
sent to the house and I think it was sent to the house
income from the building which they could pay the interest and pay
money with the interest; and also said that the interest was
sent to the house in October, and the money was sent to him
there was no money, and he then sent to Mr. Bernstein and told him
he would have to wait until, that time would be in November
in the building; and he went with the money to the bank in
October when he was paid \$100; in the latter part of 1931 they
visited the property and talked with the owner; and in 1931
were visited, the lights were torn out from the walls, the window
was coming down and the roof was leaking.

Mr. Bernstein's testimony is to the effect that he is employed
by the Title Insurance Corporation and made a search of property
located at 2115 Broadway Avenue, found the taxes for 1930 amounting
to \$488.75 were paid by the owner June 10, 1930; that the taxes for
1931 were \$575.97, and that on October 1, 1931, there was a payment
on account by the owner of \$244.98. There was a tax return for
taxes on November 3, 1931. The taxes for 1930 amounted to \$488.75
and nothing was paid on said. He said there were no delinquent
taxes on April 9, 1931. The 1932 taxes did not become delinquent
until May 15.

Exhibit 14, 1931, Exhibit 15, 1932, and Exhibit 16
showing the taxes for 1930, 1931, and 1932, which were
shown in the connection a ledger of transactions and receipts.
It contains the description and dates that the same are described
therein in the form of the property which is described
in the ledger, which was introduced in evidence.

this and other loans.

Jiracek testified plaintiff came to his office at the time in question inquiring if he had anything to sell; that he gave him the name and address of the property covered by the mortgage and asked him to go and look it over. He says plaintiff came back in two or three days and said he would accept it, that it was all right. Jiracek says plaintiff's daughter was not with him on that or on any previous occasion when he bought securities, some of which at that time, April 9, 1931, were in process of foreclosure. He positively denies that he ever agreed to guarantee any of these securities, denies that he ever wrote the letter of March 16, 1931, or that any such letter written either by him or any member of his organization is in his files. He says that interest on these securities up to April 1, 1931, was paid in full and denies that he was in any way acting in behalf of the bank; he says that personally he did not know anything about the condition of the property. Mrs. Kaiman testifies that Jiracek said he was selling the bonds "from the Lawn-dale National Bank." He denies this.

The action of plaintiff is in substance for fraud and deceit. In such case we said in Malewski v. Lackiewicz, 282 Ill. App. 593:

"It is also the law that in an action for fraud and deceit the evidence by which these essential elements are established must constitute proof so clear and convincing in its nature as to leave the mind well satisfied that each and all of these elements of fraud have been established. Union Nat. Bank v. State Nat. Bank, 168 Ill. 256; Freston v. Lloyd, 269 Ill., 152; Woll v. Lawrence, 276 Ill. 11; Garrett v. Garrett, 345 Ill., 377; Douglas v. Lewis, 367 Ill. App., 508; Standard Rig. Co. v. Siot, 191 Wis., 14; s.c., 105 Am. St. Rep. 1016."

While the rule announced is for the trial court it is apparent from the remarks of the trial Judge that he had serious doubts of the sufficiency of the proof. At the time the judgment was entered attorney for defendants said, "Your honor is entering judgment against all three of the defendants?" The Court: "Yes, I don't know which one is liable, or whether any of them is liable." The Court also said,

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1. The first part of the report is a summary of the work done during the year. It is a very brief summary, but it gives a good idea of the work done.

THESE ARE THE ONLY TWO CASES IN WHICH THE SUBJECTS WERE NOT IN THE SAME GROUP.

"It is an unfortunate situation. It is unfortunate for everybody concerned. It is unfortunate for an old man like this to lose all of his life's accumulations in one investment. He looks like an honest, hardworking citizen; I suppose he is a citizen; maybe not. On the other hand the practice is that these bankers don't guarantee securities they sell. So that it is a difficult matter to pass upon. There is a contrariety of testimony. One side tells it one way and the other side the other way. And I can't be governed entirely in the matter by sympathy. * * *

In so far as the bank is concerned, there is practically no evidence showing that Jiracek was its agent in making the sale of the securities. The Lawndale State Bank was the issuer of the notes in the first instance and the evidence does not show that the defendant bank was the owner when the sale was made. No official of the bank was called as a witness. In so far as the suit was based on a promise to guarantee the loan, Knats v. Madison and Kedzie Bank and other cases above cited show that this was ultra vires the powers of the bank. The judgment therefore as to the bank cannot stand in the absence of a showing that it was responsible for the alleged fraud. There are facts in the evidence which tend to discredit the testimony of the witnesses for plaintiff. As an illustration is plaintiff's reluctance to admit his own signature. Again, it is unusual for a seller of securities to guarantee the payment of the indebtedness. On the other hand it would seem that Jiracek would have known something about securities he was selling. To the suggestion that plaintiff did not act promptly in rescinding upon discovery of the alleged misrepresentations plaintiff's attorney replies that the suit is not brought on the theory of rescission but only for damages resulting from the misrepresentations, and that only the statute of limitations bars such an action. This is true, but such action would require proof of the value of the securities retained and which

"It is an unfortunate situation. It is unfortunate for everybody concerned. It is unfortunate for the man who is to lose all of his life's accumulations in one investment. He looks like an honest, hardworking citizen; I suppose he is a citizen; maybe not. On the other hand the practice is that these bankers don't

reckonize they sell. So that it is a difficult matter to prove. There is a consistency of testimony. The other side is one way and the other side the other way. And I can't be governed by

In so far as the bank is concerned, there is practically no

the securities. The bank's assets were not issued of the notes for the first investment and the testimony does not show that the bank and bank was the owner when the note was made. No official of the bank was called as a witness. In so far as the bill was passed as a

promise to guarantee the loan. James V. Hamilton and William Frank and other cases above cited show that this was after the power of the bank. The judgment rendered as to the bank cannot stand in the opinion of a witness that it was responsible for the alleged fraud. There are facts in the evidence which lead to discredit the testimony of the witness for liability. It

an illustration is Hamilton's reference to Smith his own signature. Again, it is unusual for a holder of securities to

It would seem that if there were any such thing as a securities he was selling. In the suggestion that Hamilton's not not properly in reaching upon discovery of the alleged misrepresentation Hamilton's attorney advised him that he was not bound on the theory of rescission but only for damages resulting from the misrepresentation, and that only the statute of limitations was a bar. This is true, but such a view would

plaintiff deposited with the bank as depository of the bondholders' Protective Committee. There is no such proof in the record. Without such proof the damages could not be ascertained. Siltz v. Springer, 236 Ill., 276; Johnston v. Shockey, 335 Ill., 363. In the absence of proof we infer that the notes secured by the mortgage have a substantial value. It is clear, therefore, that the judgment is excessive in amount but to what extent we cannot tell. For the reasons indicated the judgment is reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

McSurely, P. J., and O'Connor, J., concur.

40312

MARIE ECKWALL,
Plaintiff Below,

vs.

HUBERT J. ECKWALL,
Defendant Below.

On Appeal of LELVILLE R. THOMSON,
(Petitioner Below)
Appellant.

53A
APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

299 I.A. 621

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Thomson appeals from an order entered May 6, 1938, dismissing his petition for an attorney's lien. The material facts, which for the most part appear from a stipulation, appear to be as follows:

August 3, 1931, Marie Eckwall obtained a decree of divorce from her husband, Hubert J. Eckwall. The decree gave the custody of their infant daughter, Mary Jane, to the mother and directed the payment to Mrs. Eckwall "as alimony for the support of said child" of \$35 a month, and directed the payment of \$1100 to Mrs. Eckwall in full of court costs, solicitors' fees, alimony and dower, \$125 to be paid within 10 days and the balance in monthly installments of \$83 each. November 15, 1936, upon petition of Mrs. Eckwall the decree was modified, increasing the payment to be made to her for the support of their child to \$50 a month. Marie Eckwall remarried and is now Marie Lindehnout.

October 15, 1937, plaintiff filed her petition for a rule on defendant to show cause and on December 8 retained Thomson to represent her. She entered into a written contract by which she employed him as her solicitor and agreed to pay him in addition to any sum allowed by the court 25% of the amount actually collected. Thomson appeared in court for her. There were many continuances and finally a hearing. December 16, 1937, the court entered an

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order finding that there was due Mrs. Eckwall \$1372.33 "from the date of decree to August 2, 1936, at which time the child, Mary Jane Eckwall, became eighteen years of age, said moneys being due to plaintiff for past support of said child," and the proceeding was thereupon continued to January 14, 1938, and placed on the contested motion calendar.

February 1, 1938, Mrs. Eckwall filed a petition praying that Frank A. McDonnell be substituted as her solicitor. The petition was denied but McDonnell allowed to appear as associate counsel. February 25 Thomson learned a settlement had been reached through McDonnell acting for Mrs. Eckwall and Francis Sullivan, solicitor for defendant, Dr. Eckwall, upon terms that defendant pay \$600 in full settlement of the \$1372.33 then in arrears, including alimony, court costs and attorneys' fees; that \$600 of this amount had been paid to plaintiff, who immediately turned same over to her daughter, and that Sullivan was holding back \$200 pending confirmation of the settlement by the court. Hereafter Mr. Coturn entered his appearance as additional counsel for Mrs. Eckwall.

March 1, 1938, Thomson, pursuant to direction of the court, filed his petition for allowance of fees as solicitor for plaintiff, set forth the substance of his contract with Mrs. Eckwall, and prayed that the amount of his fees be allowed against Marie Eckwall and the defendant, Hubert J. Eckwall. The petition came on for hearing. The court was advised of the proposed settlement and that \$600 had been paid to Marie Eckwall, of which she had paid \$200 to McDonnell for his fees; that she had \$200 of the amount in her possession; and that \$200 remained in the hands of defendant's attorney, Sullivan. Thereupon an order was entered by the court directing the parties (including McDonnell) to deposit the proceeds with the Clerk of the Superior court pending approval by the

court of the settlement agreement and the disposition of Thomson's motion for the allowance of fees. The order provided that ^{the} \$1620 so deposited be held subject to the further order of the court, and the cause was continued to May 6, 1938. May 4, 1938, Thomson served a notice of attorney's lien on defendant, Hubert J. Lockwall, and the Clerk of the Superior court, Victor L. Schlager. May 6 Thomson presented to Judge Lupe his petition to enforce his attorney's lien. He was allowed to file it. Plaintiff answered and the matter was heard in open court. Thomson introduced his notice of attorney's lien showing service by registered mail upon defendant and the then Clerk of the Superior court, also proving his contract with plaintiff. Defendant introduced the agreement to settle and the written acknowledgment of receipt of the sum of \$600, and a statement signed by Mrs. Minderhout that she had given the money to her daughter. Mrs. Minderhout also testified that she made the agreement with Thomson to prosecute her petition to secure payment of money in arrears; that Mary Jane became of age August 2, 1936, had remained in her custody and control since the entry of the decree of divorce; that she was dissatisfied with Thomson and consulted McDonnell who advised her that the contract with Thomson was null and void; that 25% for services was too much. Mrs. Minderhout said she wished to beat the petitioner out of his fee; that she and McDonnell arranged with Sullivan, attorney for defendant, to settle the matter for \$800; that in the presence of these attorneys she received \$600 of the amount and in their presence turned it over to her daughter; that McDonnell was paid \$200 for his services, and that at his direction she turned the money over to her daughter in order to beat Thomson out of his fees. She said she deposited \$220 remaining in her hands with the Clerk of the Superior court as ordered. She had not received the \$200 from Sullivan but understood this was also deposited with the Clerk of the court. Upon the evidence the court

dismissed Thomson's petition.

The statute providing for the creation of a lien in favor of an attorney rendering services is found in Ill. State Bar Stats., 1937, chap. 13, par. 14, sec. 1, p. 176. It provides in substance that attorneys-at-law should have a lien upon all claims, demands and causes of action, including all claims for unliquidated damages, which may be placed in their hands by their clients for suit or collection, or upon which suit or action has been instituted, for the amount of any fee which may have been agreed upon by and between such attorneys and their clients; or in the absence of such agreement, for a reasonable fee. It is, however, provided that the attorney shall serve notice in writing, "which service may be made by registered mail, upon the party against whom their clients may have such suits, claims or causes of action," and that the lien shall attach to any verdict, judgment or decree entered and to any money or property which may be recovered on account of such suits, claims, demands or causes of action from and after the time of service of the notice.

The adverse parties have not filed any brief. The contract is not questioned here nor was there any evidence tending to show that it was unreasonable. On the contrary, the record indicates that the charges were very reasonable considering the amount of service necessary. The uncontradicted evidence shows that against the advice of petitioner the parties in interest saw fit to settle all claims of every kind and nature, including attorneys' fees. Mrs. Eckwall admits a purpose to defraud the petitioner and beat him out of well earned fees. The cases cited in petitioner's brief show that in the case of such settlements an attorney with a contingent contract, who has given notice, is entitled to receive the percentage agreed on the amount recovered by suit or paid in settlement, and that this lien may be enforced by petitioner in

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nothing to show of any other interest and no longer expected and

certification, and this title may be entered by registration in

the client's cause of action. Case v. Emerson-Draftingham Co., 269 Ill., 94; Standidge v. Chicago Railways Co., 254 Ill., 524; that service of notice of an attorney's lien operates as an assignment to the attorney of an interest in the proceeds of a settlement, that may be made by the debtor with a client, Baker v. Baker, 258 Ill. 418; and that such lien will attach to the proceeds of a settlement which by order of the court has been deposited with the clerk of the court pending approval by the court of the settlement, upon service of notice of lien upon the defendant, Catherwood v. Morris, 360 Ill., 473. The cases cited also show that an award fixed in a decree of divorce later increased by order of court for the support of a child, by force of the decree becomes a debt due from the defendant to the plaintiff on which plaintiff can recover in an action at law, Paulin v. Paulin, 195 Ill. App., 350.

It is suggested that the trial court was of the opinion that petitioner's lien could not be enforced without notice to his client, the plaintiff. If so, the theory was erroneous. The statute does not require notice to the client, and it has been held unnecessary in Catherwood v. Morris, 360 Ill., 473.

For the reasons stated the judgment is reversed and the cause remanded with directions to the Chancellor to enter judgment against Mrs. Vanderhout and Robert J. Corvill for \$200 and direct the Clerk of the court to pay the petitioner, from the funds now in the hands of the Clerk, \$200 in satisfaction of the same.

REVERSED AND REMANDED WITH DIRECTIONS.

McSurely, P. J., and O'Connor, J., concur.

40348

PEOPLE OF THE STATE OF ILLINOIS ex rel.
OSCAR NELSON, Auditor of Public Accounts
of the State of Illinois,
Plaintiff,

vs.

PRUDENTIAL STATE SAVINGS BANK, a
Corporation,
Defendant.

CHARLES W. ALBERS, Receiver of Prudential
State Savings Bank, a Corporation,
(Petitioner) Appellant,

vs.

JACOB BETTEN and BERNIE BETTEN, Individually
and as Executors of Estate of Label M. Eady,
Deceased,
(Respondents) Appellees.

54A
APPEAL FROM
SUPERIOR COURT
OF COOK COUNTY.

299 I.A. 622¹

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the receiver from an order entered May 9, 1933, sustaining exceptions to the report of a master and denying the prayer of the receiver for an order setting aside a prior order entered on motion of his predecessor, directing him to accept an offer of the estate of Label M. Eady to pay \$1,000 in full settlement of a claim for \$7168.70 allowed by the Probate court of Cook county as of the sixth class. The material averments of the petition are that this order was entered through fraudulent concealment of facts and fraudulent misrepresentations of fact made by the attorney for the estate to the deputy receiver in charge of settlements. The master found the attorney for the estate who conducted negotiations had "information he did not divulge to the said receiver at the time he sought to make such settlement with him", and that "respondents by withholding such information, which was peculiarly within their knowledge, were guilty of such fraud as would vitiate said settlement and that there is no necessity for petitioner to return said sum of One thousand Dollars received by him but he is

entitled to hold same as a payment on account." The Master recommended the settlement "be set aside and said petitioner be permitted to take such other action as he may see fit."

Respondents filed objection to the report which the Master never passed on, he having in the meantime resigned on account of illness. However, the objections were considered as exceptions by the Chancellor and sustained, and a decree entered denying the prayer of the petition. Upon the filing of the record in this court respondents made a motion to dismiss the appeal on the ground that it was taken by the receiver without authority of the court. The motion was denied. It is reargued in the briefs, but we adhere to our former decision.

Petitioners argue that although objections to the report of the Master were not passed on by him, his report is entitled to the same consideration that would otherwise be given it. Manifestly, this is not possible. The evidence is largely documentary. The bank was closed June 18, 1932, and a receiver appointed. January 12, 1934, William L. O'Connell became successor receiver and upon his death on July 24, 1936, Albers was appointed successor. Among the assets of the bank were four notes of Mabel Eddy for \$2250, on each of which there was an unpaid balance of principal to the amount of \$1600 with interest. Mabel Eddy died testate January 31, 1932, and on July 22, 1933, the claim based on these notes was allowed by the Probate court against her estate in the sum of \$7168.70. Her will gave three specific legacies of \$5000 each to friends named, with residue to Jacob Betten and Minnie Betten, who were named as executors. About May 1, 1936, the attorneys for the estate opened negotiations with the receiver for settlement. Mr. Keenan, the deputy receiver, informed them that an offer for less than 100% must be made in writing. May 6, by letter, the attorney for the estate made such an offer which Keenan, by letter of May 9, 1936, rejected. June 1, 1936, the attorneys for the estate in another letter made

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the Americas (CLA) in the United States.

...of the fact that the ...

on July 22, 1966, this claim was followed by the

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residence to Jacob Reiser and family before war, and since war.

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which are, indeed, in families as various and diverse as

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with its various, and often conflicting, interests.

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further alternative offers, one of which was to pay \$1000 in full settlement. June 12 O'Connell recommended acceptance of \$1000 to the Auditor of Public Accounts. The Auditor concurred and on June 18, 1936, the receiver wrote the attorneys the Auditor had approved and that the offer was accepted. June 27, upon petition of the receiver, the order was entered authorizing the settlement of the claim in full upon payment of \$1000. The receiver notified the attorneys on July 1st of the entry of the order of June 27, and on July 10 payment in full was made by the personal check of the attorneys for the receiver. July 24 O'Connell died and Albers was appointed successor. November 20, 1936, Albers filed his petition to have the order of June 27 set aside as above set forth.

The facts alleged to have been fraudulently concealed and misrepresented concerned the estate of Mabel M. Eddy.

May 12, 1928, Charles M. Eddy (then solvent) was divorced from his wife Mabel for his fault. The decree provided for the payments of alimony which he did not make. Charles M. Eddy died November 10, 1930, testate, and his daughter, Jeanette Eddy Williams, was named executrix of his will and qualified. Mrs. Mabel Eddy filed her claim for unpaid alimony against the estate of Charles M. in the Probate court and it was allowed in the amount of \$126,400. January 31, 1932, Mabel Eddy died testate, naming Minnie and Jacob Betten as executors. This claim for alimony against the estate of Charles M. Eddy, with the exception of a few items of personal property, a few pieces of real estate encumbered by mortgages and taxes, constituted her entire estate. The estate of Charles M. Eddy had become insolvent, made so (as the executors of Mabel M. Eddy's estate averred) through his fraud in conveying to his daughter, Jeanette Eddy Williams, all his estate including a large amount of insurance on his life in which his daughter Jeanette was named as beneficiary. The executors of Mabel Eddy's estate filed a

bill to set aside these transactions; the suit was dismissed in the trial court and on appeal to this court the decree was affirmed for the reason that the suit was filed prematurely. Betten v. Williams, 277 Ill. App. 353. The opinion of this court also indicated doubt as to whether the proceeds of the insurance policies could be reached. Leave to appeal was denied by the Supreme court.

The letter of the attorneys for the estate of Mabel Eddy dated June 1, 1936, to the receiver of the bank informed him of the above facts, stated that the estate of Charles M. Eddy was hopelessly insolvent; that at the time of his death he owed practically \$300,000; had transferred to his daughter Jeanette \$500,000 in insurance policies; that the other assets of his estate were worth at the most \$30,000 or \$40,000; that Mabel Eddy's estate had litigated the question of the fraudulent purchase of the insurance policies with results as stated; that it was the intention of the executors of the estate of Mabel Eddy, when the estate of Charles M. Eddy had been closed, to file another bill; that the United States Government had a claim against the estate of Charles M. Eddy for \$9,000 and was threatening to take all the assets of the estate if it was not paid, in which event nothing would be received for the Mabel Eddy claim of \$126,400 unless these insurance policies were held to be impressed with a trust; that one of Mr. Eddy's daughters had offered to purchase the assets of her father's estate for a sum in excess of its market value and thereby raise a fund to pay the Government and make a small distribution to creditors. The letter said: "General creditors will receive approximately 9% on the dollar. This offer, however, is contingent upon a complete settlement of our claim against her individually." The letter pointed out three specific legacies of \$5000 each to individuals named in Mrs. Eddy's will and also that Mr. and Mrs. Betten, executors, were her residuary legatees; advised that the debts of the estate aggregated

about \$12,000 of which \$3,000 were first class claims. The letter continued: "If we continue to litigate our claim against Mrs. Eddy personally and are successful, all of the debts would be paid in full including your debt. The three legatees would receive \$5,000.00 each and our clients would have approximately \$60,000.00 left after payment of expenses and attorneys' fees. On the other hand, if we were not successful, in such litigation, there is little likelihood that any of the general creditors or legatees would receive anything. You, of course, would be in a little better position than the others since you would still have your lien upon the real estate." The writer of the letter went on to express the opinion that chances of success in litigation were not sufficient to warrant taking the chance of receiving nothing, and that it would be to the interest of all parties if the settlement could be made "so that all the parties in interest will receive something proportional to their interest." The writer of the letter also said that he saw no chance of working this out unless the receiver was willing to take back the real estate covered by his mortgages and share with other creditors on the basis of deficiency; that the sum of \$500 had been suggested because it was substantially the limit of ability to pay and still leave other parties in interest the sum that would warrant them in releasing their claims. The letter concluded by offering to pay \$1,000 in lieu of the real estate and \$500 theretofore offered and concluded: "I don't see how this Estate can be worked out unless you would be willing to take around a thousand dollars."

Petitioner does not assert that any statement made by the attorney for the Mabel Eddy estate was in fact false. The theory of petitioner is (to use his own language) "that a fraud was perpetrated ^{by} upon the petitioner_/the respondents in failing to disclose all of the facts during the negotiations for settlement, including the fact that the Mabel E. Eddy estate, against which the petitioner

about \$10,000 of which \$5,000 were three years' interest. The latter continued: "If we continued to live on the same amount and pay \$10,000 monthly and the interest, all of the money would be paid in 1911 including your debt. The three hundred would receive \$2,000.00 each and our estate would have approximately \$20,000.00 left after payment of expenses and attorney's fees. On the other hand, if we were not successful, in such litigation, there is little likelihood that any of the general creditors or legatees would receive anything. You, of course, would be in a little better position than the other heirs. You would still have your life insurance policy, and would be the latter part of the estate. The opinion that a case of divorce in litigation were not justified in waiting until the end of the year - coming nothing, and that it would be to the interest of all parties if the suit were pending for some time longer is incorrect. The will is not subject to litigation. The will of the testator is final and the estate of the testator is final. The testator was willing to give back the real estate covered by his mortgage and was with other children of the family of half-sister; that the sum of \$200,000 had been mortgage money to her mother. Finally the fact of which to pay and still leave other parties in interest the sum that would remain for the legatees, their claims. The latter concluded by offering to pay \$10,000.00 in full for the real estate and the legatees offered and concluded: "I don't see how this estate can be worked out unless you could be willing to take around a thousand dollars."

Petitioner did not assert that any statement made by the attorney for the legal heirs was in fact false. The theory of petitioner is (to use his own language) "that a trust was bequeathed to the petitioner by the respondents in failing to disclose all of the facts during the negotiations for settlement. In fact, the

had a claim for \$7168.80, was receiving \$37,500, instead of \$11,502.40, as represented by the respondents."

The material facts in regard to the actual settlement made between these two estates appears to be that Mr. Kelley, of the firm of Ditchburne & Lounsbury represented the one estate and Mr. Williams of the firm of Castle, Williams, Long & McCarthy the other. Sometime in the spring or fall of 1935 Mr. Williams suggested that the only way out was some kind of settlement by which money could be obtained for some of Jeanette Eddy's immediate needs and to satisfy the claim of the United States Government against her father's estate. A number of conferences were held and it was finally agreed to try and get some disposition of some of the insurance policies from which enough money could be realized to pay or compromise all liabilities against the Mabel Eddy estate and satisfy the legatees, specific and residuary, and thus dispose of all litigation against Jeanette Eddy. It was agreed Mr. Kelley would communicate with all persons interested in the Mabel Eddy estate to the end of negotiating settlements; that Mr. Williams would in the same way communicate with creditors and persons interested in the Charles M. Eddy estate. Pursuant thereto negotiations were opened up for the settlement of petitioner's claim.

One of the insurance policies was issued by the Aetna Life Insurance company and about April 1, 1936, Mr. Williams and Mr. Kelley went to Hartford, Connecticut, to take up the matter with representatives of that company. They were told in substance that if Jeanette Eddy would personally benefit the Insurance company would advance cash (not more than \$70,000) toward the end desired. Upon returning to Chicago Mr. Kelley took the matter up with the legatees and creditors of Mabel Eddy, including the undertakers who had a claim against the estate for \$2532.50. Tentative terms with these persons were arranged. About the same time the letter

and a check for \$100.00, the balance of \$100.00, was paid to

the company on the 1st of January, 1934.

The company then in 1934, was organized as follows:

1. The company was organized as a corporation under the laws of the State of New York.

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of May 1st was sent to the deputy receiver Keenan with offer which he refused to accept. Later the letter of June 1st was sent with offer which was accepted, as stated. When Williams and Kelley again conferred it was found that they were short about \$5000 of the necessary amount of money and Williams wrote the Aetna company asking if the amount to be advanced might not be increased to \$75,000. In response the Aetna company sent its representative, Mr. Cavanaugh, to Chicago. At a joint conference Mr. Cavanaugh said he had heard rumors Jeanette Eddy was a spendthrift and the Insurance company would not be willing to advance money without a court order. It was then decided with her consent to apply for a conservatorship for her. The Probate court of Cook county named the Trust company of Chicago and Anna Carpenter, a relative; Williams became the administrator with the will annexed of the Charles M. Eddy estate. The matter of settlement was again taken up and it was agreed that the amount to be paid to the executors of the estate of Mabel M. Eddy and to persons interested in her estate should be \$37,500. Mr. Kelley testifies - and his testimony is not contradicted - that Mr. Williams suggested that as all the other creditors of the Charles M. Eddy estate were receiving 9.1% of their claims he preferred that the estate of Mabel M. Eddy should receive the same amount. This agreement was made shortly before July 1, 1936. Orders were obtained from the Probate court and a check for \$11,502.40 was paid to the estate of Mabel M. Eddy on account of its claim against the Charles M. Eddy estate, and the balance of \$25,997.60 to the Bettens and their attorneys.

The controlling issue here seems to be one of fact. Mr. Kelley testifies that in oral conversations with the deputy receiver and his attorneys he gave full information of the settlement in so far as he had knowledge at the time of these conversations, and that all the facts were not known to him until about the first

day of July, 1936, when the settlement was made. He says there was no obligation to inform petitioner's predecessor of the things of which he did not have knowledge. His evidence as to what was said at these oral conversations is contradicted by the parties with whom he says he talked. Petitioner urges as a matter of law that although a representation may be true when made, if thereafter such representation by changing circumstances becomes false, the representation will constitute actionable fraud if the parties to whom the new representation was made are ignorant of the changed circumstances and the speaker fails to inform them of the changed conditions, allowing them to act in the belief that the original conditions still exist. Petitioner points out that the conservator's estate for Jeannette Eddy was opened a few days after Mr. Kelley received notice from the receiver of his acceptance of the offer of compromise; that within three days all the terms of the settlement were reported to the Probate court. Petitioner says when Mr. Kelley learned the facts he should have reported them to the receiver, citing Loewer v. Harris, 57 Fed. 368, 6 C. C. A. 394. We do not question the rule of law announced in that case. In weighing the issues of fact it appears it is the word of one of the parties against the word of the other, and the burden of proof was upon petitioner not only to show fraud by a preponderance of the evidence but by clear and convincing preponderance. Petitioner relies much on the Master's report. The rule as to the weight to be given to the findings of a master is not applicable because the Master, who was ill, filed the report without ruling on respondent's objections. The record does not inform us that he gave any consideration to these objections. The evidence taken is in the record precisely as if it had been taken by deposition and the cause heard by the court. True, in considering the findings of the Chancellor we must not overlook the fact that he did not see and hear the witnesses.

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We have taken this into consideration. We are not convinced by the arguments of petitioner on the facts. The letter of the receiver to the State Auditor and his petition to the Chancellor for authority to settle do not indicate any reliance by either of them upon representations such as the petitioner now argues were made and relied on. The death of William E. O'Connell deprives us of the benefit of his testimony. He was at that time represented by a competent attorney. It appears that he caused the facts to be investigated on his own account; that most of the material facts were of record in the courts. O'Connell was a competent and experienced receiver.

On the issues of fact the Chancellor has found in favor of respondents and this court would not be justified in holding the Chancellor's findings to be against the manifest weight of the evidence. The correspondence indicates that in making his settlement with the estate of Mabel Eddy the receiver understood right well that her estate was trying to get the best terms possible. There were many contingencies in connection with the settlement of the controversies between the two estates and the different parties who were interested in these estates. Everything was conditioned upon approval by the Aetna Insurance company which was to furnish the money. The consent of Jeanette Eddy and her conservator also became indispensable. The bank had received 25% of the debt due to it before it went into receivership. There were many equities to be settled and worked out, including the right of the attorneys for the Mabel Eddy estate to receive just compensation for services which had been well performed by them. Their claim for compensation would be entitled to priority ahead of the claim of petitioner. The petitioner's claim had been allowed as of the 6th class. Many of the claims against the estate of Mabel Eddy were preferred. For instance, the claim of the undertakers for \$2532.60, the claim of the Collector of Internal Revenue for \$37.60, and some others. The total of the

claims filed and allowed amounted to \$11,165.77, without reference to attorneys' and executors' fees, personal property assessments (including inheritance taxes and other expense of administration) which would amount to a considerable sum.

It is apparent from all the correspondence that O'Connell as receiver well understood that his claim against the estate of Mabel Eddy was being settled upon an individual basis distinct from all the other claims. As a matter of fact, the money with which the settlements were finally made all came from Jannette Eddy. The whole amount paid was \$37,500. Of this amount \$11,502.10 was paid to the executors of the estate of Mabel Eddy in full settlement of her claim against the estate of Charles M. Eddy, and \$25,997.60 was paid personally to the legatees named in her will and the attorneys who had practically created her estate.

Assuming the findings of fact by the Chancellor to be true, respondents were not interested in how the settlement should be made or the proceeds thereof divided. Possibly the distribution might have been worked out by paying the whole amount of \$37,500 to the executors of the estate of Mabel Eddy, but the conservator of Jannette Eddy decided otherwise. We may guess the motives but we do not know. The question of taxes may have had much to do with this, or possibly (as there is testimony tending to show) Williams as administrator de bonis non of the estate of Charles M. Eddy desired that all creditors of that estate should receive their claims on a pro rata basis. This comes far from establishing fraud against respondents by the estate of Mabel Eddy. It is apparent O'Connell (experienced as he was) know the difficulties of the problem and thought his estate fortunate in getting \$1000. The final settlement made by all the parties was to some extent based upon the settlement of the claim of the Bank and others against the estate of Mabel Eddy, which was made with the approval of the court. It is

difficult to conceive of any theory upon which his successor can now overturn that settlement. We hold as a matter of fact the claim of fraudulent misrepresentations through concealment of information which the receiver was entitled to have is not sustained by the clear preponderance of the evidence required in such cases. The order of the trial court is therefore affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

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MAXWELL LARDIS,
Appellant,

vs.

TIMOTHY KLAPPERICH and
EMIL ROSENTHAL,
Appellees.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

55A

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT. ²
299 I.A. 622

In an action on contract by plaintiff against defendants for money alleged to be due, as agreed, for a retainer fee as attorney, and upon trial by jury, at the close of all the evidence defendant Emil Rosenthal requested an instructed verdict in his favor, on which the court reserved its ruling. The cause was submitted to the jury which returned a verdict in favor of plaintiff with damages assessed at \$300. Thereupon defendant Emil Rosenthal made a motion for judgment notwithstanding the verdict, pursuant to section 63 (3a) of the Civil Practice Act (Ill. State Bar Stats., 1937, chap. 110, par. 192, p. 2404.) The motion was allowed and judgment entered notwithstanding the verdict in favor of both defendants. From that judgment plaintiff appeals.

The question for decision is whether the court erred in allowing the motion and in entering judgment. Defendant Klapperich has not appeared in this court or filed any brief. It is argued in behalf of Rosenthal that the ruling of the court was proper for the reason that the uncontradicted evidence sustained his defense of the Statute of Frauds set up in his affidavit of merits, and that under the evidence he was not liable to plaintiff for services rendered. In passing upon a motion of this kind the question for the trial court is whether there was any evidence from which the jury could have found that defendant Rosenthal was liable as alleged in the statement of claim. Holever v. Curtiss Candy Co., 293 Ill. app. 586, and cases there cited.

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The evidence tends to show that plaintiff is an attorney at law practicing his profession in Chicago; that Klapperich was arrested on a criminal charge, taken into custody and his bond fixed at \$5000; that on March 11, 1938, while he was in the County jail, Mr. Rifas, who was then at the law office of plaintiff, called Rosenthal by 'phone and introduced him to plaintiff; that Rosenthal told plaintiff he was interested in the Klapperich case; that Klapperich was connected with his (Rosenthal's) firm; that he had been with him for some time and was innocent of the charge against him; that he (Rosenthal) had been called to come at once from out of town; that he wanted to take care of the matter and was anxious to have Klapperich released on bail; that if the bank was open he would put up the money for the bail himself, but since that was impossible he would guarantee a bond. Plaintiff says he told Rosenthal that he (Landis) would have his own sister (Mrs. Koch) schedule her real estate on the bond if Rosenthal would give her a written guaranty to hold her harmless in case Klapperich failed to appear, and that Rosenthal agreed. He says: "I told him I would charge him \$300 retainer fee and make no charge for the bond. He agreed to this. I offered to send over for the check, but Rosenthal said he was in a hurry. He said, 'I want you to immediately contact or confer with Klapperich. I want you to tell him what you and I talked about, and I want Klapperich to know that I am looking out for his interests, and I would like for you to get me a statement from Klapperich to me that you were over to see him, and also a statement from him to give you a check for \$300.' He said I should send over to his hotel after I finished, and 'I will give you the check for \$300 and sign this indemnity agreement.' Then I prepared the indemnity agreement." Plaintiff further testified that he contacted Warden Bain and met Klapperich

The witness stated that he had been in the office of the
at law practicing his profession in Chicago; that during the
period of his employment, he was employed by the
firm of [redacted]; that in March, 1917, he was
told, Mr. [redacted], who was then the law partner of [redacted],
called Rosenfeld by name and introduced him to [redacted];
Rosenfeld left immediately after his introduction to the witness and
that conversation was conducted with him (Rosenfeld) and he
had been with him for some time and was conversant with the
subject; that he (Rosenfeld) had been coming to work in order
from out of town; that he seemed to have come on the matter and
was anxious to have information relative to [redacted]; that he was
was open he would not as the witness was not himself, but that
that was impossible as he could not see [redacted] and
told Rosenfeld that he (Rosenfeld) had the car taken (his
look) relative to the matter and was in possession of the
for a written authority to make the same in case [redacted]
failed to appear, and that Rosenfeld agreed. He said: "I will
him I would change the date whenever I see and come to Chicago for
the bond. He agreed to this. I offered to take over the
check, but Rosenfeld said he was in a hurry. He said, 'I want you
to immediately contact or confer with [redacted]. I want you to
tell him that you are interested, and I want [redacted] to know
that I am feeling out for his interest, and I would like to
to get a statement from [redacted] so that you were over to
see him, and give a statement from him to give you a check for
\$1000. He said I would hand over to him after I finished,
and I will have you the check for \$500 and sign the indorsement
thereof. Then I contacted the [redacted] [redacted]."
[redacted] [redacted] that he contacted [redacted] and [redacted]

in the warden's office at the county jail at about 9 o'clock that evening; that Rifas, Sain, Klapperich and he were there; that he told Klapperich he had agreed with Rosenthal to prepare all the necessary papers to get him out on bail, and that his sister was signing the bond of \$5000 at no cost to anyone, and that Rosenthal was agreeing in writing to indemnify Mrs. Koch. He further says: "I told Mr. Klapperich, 'Now, you understand that from the agreement I had with Rosenthal, that you and Mr. Rosenthal are to pay me \$300 retainer fee.' Mr. Klapperich said, 'That is agreeable to me.'" Then he prepared Exhibit 1; Klapperich signed it, and afterward he explained that Rosenthal wanted a paper showing that it was agreeable to Klapperich. Then he went to the Bond court with the bail slip he obtained from the county jail and prepared the bond and submitted the bond to the court and paid the dollar and Klapperich was released.

Exhibit 1 is in evidence, is dated March 11, 1938, is directed to E. Rosenthal, and states: "Please give my attorney, Maxwell Landis, your check for \$300.00 as retainer's fee. Mr. Landis will have me released on bond on your letter of indemnity." The letter is signed "I. E. Klapperich." Plaintiff's evidence is corroborated by that of Samuel Rifas. Plaintiff also introduced in evidence a receipt from the Municipal court of Chicago of that date, showing the payment of \$1.00 by him for real estate investigation in the case of People v. Klapperich. Plaintiff says he did not know at this time that Klapperich was represented by Mr. Bradburn as his attorney. Plaintiff further testified that on the Wednesday following the Saturday when he saw Rosenthal he had a meeting at his office with Rosenthal and Klapperich. He told them he had taken up the Klapperich matter with Mr. Stiefel, who represented the Empire Paper Company, from which the bonds were stolen; he says Rosenthal said to him that he would have to give plaintiff his check for \$300, but remarked that didn't cover the entire case, to which plaintiff replied that it did

[illegible]

not. Rosenthal asked what would be the whole cost but an objection to defendant's answer was sustained by the court, upon that theory we are not informed. At any rate, plaintiff told Rosenthal he was looking to him for payment and asked for a check for \$300. Rosenthal said to never mind the check but talk about the whole case, and asked what it would cost. They then discussed the entire case. Rosenthal left, after which Klapperich told plaintiff he did not have the money and was sorry Rosenthal didn't pay him; that he wanted to bring Mr. Bradburn, his attorney, over to see plaintiff; that Bradburn was familiar with some of the matters. Plaintiff, he says, told Klapperich that he would not proceed further in the case until he received his \$300. Klapperich replied that when Bradburn came over the matter would be straightened out.

While this evidence in material matters was contradicted by evidence offered in behalf of the defendant, that fact is wholly immaterial in deciding the question now before the court, namely, whether there was any evidence from which the jury might reasonably find defendant Rosenthal liable under his affidavit of merits.

We hold the evidence was prima facie sufficient to show an original promise by Rosenthal to which the plea of the Statute of Frauds was not a bar. Burger v. St. Louis Bed & Mfg. Co., 206 Ill. App., 256; Bettis v. Chicago Coated Board Co., 145 Ill. App., 390; Duzenberry v. Simeo, 228 Ill. App., 443. Defendant Rosenthal made no motion for a new trial in the Municipal court nor does he argue in this court that the verdict of the jury was against the manifest weight of the evidence, nor any procedural error. In this condition of the record, the motion for a new trial was waived, and since we hold that the court erred in allowing the motion for judgment notwithstanding the verdict, it follows that judgment should be entered in this court on the verdict of the jury. Denny v. Goldblatt Bros., Inc., 298 Ill. App. 325, 333, and Heuders v. Equitable Life

Insurance Society of the United States, Gen. No. 40395, opinion
filed February 27, 1939, not yet published.

The judgment of the trial court is reversed and judgment
entered in this court on the verdict in favor of the plaintiff,
Maxwell Landis, and against the defendants, Timothy Alaperrich
and Emil Rosenthal, for the sum of \$300.00.

REVERSED WITH JUDGMENT FOR
PLAINTIFF IN THIS COURT.

McSurely, P. J., and O'Connor, J., concur.

mainline, 80004, or some other Indian and its political movement.

40439

MARY STARK,
Appellee,

v.

NEW HOME BENEFIT ASSOCIATION,
a corporation,
Appellant.

56A
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

299 I.A. 622³

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In an action based upon a benefit certificate the plaintiff filed her statement of claim and the defendant, thereafter, its affidavit of merits. Plaintiff made a motion to strike the affidavit of merits but withdrew the motion. She then made a motion for summary judgment. Her motion was supported by an affidavit setting up facts, most of which were not contradicted. Defendant filed a counter-affidavit and the trial judge (hearing the motion) entered a judgment in favor of plaintiff in the sum of \$335, from which defendant has appealed.

The uncontradicted facts appear to be that on May 8, 1936, Michael Stark, husband of plaintiff, made application to the defendant, a mutual benefit association, for a membership certificate in favor of his wife, Mary. The certificate issued May 15 thereafter. The certificate of membership is No. 6042 and recites that it is issued in consideration of the membership fee, the application executed by the member, and payment of all amounts required to be paid by the certificate. Under the heading "Provisions, Conditions and Benefits," the policy provides that the applicant for membership must be in good health, have good habits, not be over 70 years of age; that the certificate and the application attached shall constitute the entire contract; further, "this Association assumes no liability until the Certificate is issued and actually delivered to

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U.S. DEPT. OF JUSTICE

SEP 11 1935

UNITED STATES DISTRICT COURT

In an action based upon a benefit certificate the plaintiff filed her statement of claim and the defendant, the plaintiff of record. The plaintiff made a motion to strike the affidavit of record but withdrew the motion. The then made a motion for summary judgment. The motion was supported by an affidavit setting up facts, most of which were not controverted. The plaintiff filed a counter-affidavit and the trial judge (hearing the motion) entered a judgment in favor of plaintiff in the sum of \$335, from which defendant was excluded.

The undisputed facts appear to be that on May 2, 1932, Michael Stern, husband of plaintiff, made application to the defendant, a mutual benefit association, for a membership certificate in favor of his wife, Mary. The certificate issued May 12, 1932, and it is The certificate of membership is No. 6025 and recites that it is issued in consideration of the membership fee, the application executed by the member, and payment of all amounts required to be paid by the certificate. When the heading "investments, conditions and benefits," the policy provides that the applicant for membership must be in good health, have good habits, not be over 70 years of age; that the certificate and the application attached shall constitute the entire contract; further, "this association assumes no liability until the certificate is issued and actually delivered to the member."

the member during his or her life time, and while he or she is in good health." The policy contains an incontestability clause as follows: "after this Certificate shall have been kept in continuous force for one year from date of issue or from date of last reinstatement during the lifetime of the member, it shall be incontestable, if assessments have been duly paid, except the limitations as to prohibited risks, crimes, and self destruction, as hereinafter set forth and made a part hereof, but if the age of the member has been misstated the amount payable under this Certificate shall be such as the member would have been entitled to at the correct age, in accordance with the classification."

This certificate was delivered May 15, 1936, and all premiums were paid. Michael Stark, husband of plaintiff, died September 2, 1937, and the certificate was in full force and effect at the date of his death. Thereafter, in September, 1937, the plaintiff submitted proofs of death. The policy provides that claims for which the association is liable will be paid within 90 days after the date of due proof of death. Defendant has not paid the sum due according to the terms of the contract.

The defense presented in the counter-affidavit is that good health was a condition precedent without which the insurance contract would not go into effect; that the consideration for the benefit certificate was not alone payment of premiums but a warranty by the insured of good health stated in the certificate and affirmed by the assured to be a fact in his application, in which, in response to questions, he stated that he had not been treated by a physician for 5 years last past and that he was then in good and vigorous health. The counter-affidavit asserted these answers were false and fraudulent; that at the time the policy issued the insured was suffering from a chronic venereal disease, was taking treatment therefor twice a week at the municipal clinic and was a patient at the Illinois Educational and Research Hospital. Defendant contends as a matter of law that the

or her the member during his life time, and while he or she is in good

health. The policy contains an insurability clause as follows: "After this certificate shall have been kept in continuous force for one year from date of issue or from date of last reinstatement during the lifetime of the member, it shall be irrevocable, it assessments have been duly paid, except the limitations as to prohibited risks, women, and self destruction, no beneficiary can be named and made a part thereof, but at the age of the member has been misstated the amount payable under this Certificate shall be such as the member would have been entitled to at the correct age, in accordance with the classification."

This certificate was delivered July 28, 1933, and all premiums were paid. Michael, husband of Plaintiff, died September 2, 1937, and the certificate was in full force and effect at the date of his death. Thereafter, in September, 1937, the Plaintiff obtained proof of death. The policy provided that claims for which the association is liable will be paid within 90 days after the date of the proof of death. Defendant has not paid the sum due according to the terms of the contract.

The defense presented in the counter-affidavit is that good health was a condition precedent without which the insurance contract would not go into effect; that the consideration for the benefit certificate was not alone payment of premiums but a warranty by the insured of good health stated in the certificate and affirmed by the insured to be a fact in his application, in which, in response to questions, he stated that he had not been treated by a physician for 3 years last past and that he was then in good and vigorous health. The counter-affidavit submitted these answers with false and fraudulent statements. That at the time the policy issued the insured was suffering from a chronic venereal disease, was being treated by a physician at the venereal clinic and was a patient at the Illinois Reformatory and Reformatory Hospital. Defendant contends as a matter of fact that the

incontestability clause of the policy is predicated upon the existence of good health at the time the benefit certificate was issued and that in the absence of good health of the applicant the certificate did not become effective or the incontestability clause applicable. In other words, that recovery is precluded by the assured's ill health at the time the certificate issued and the false and fraudulent representations made by him in order to get the certificate issued. Defendant offered to return the premiums paid by the assured.

The language of this insurance certificate was chosen by the insurance company and if ambiguous will be construed liberally in favor of the insured. (Jabara v. Equitable Life Assurance Co., 230 Ill. App. 147; Baker v. Prudential Insurance Co., 279 Ill. App. 10.) The certificate issued May 15, 1936. Assured died September 2, 1937. This was more than one year after the issue of the policy and the incontestability provision had gone into effect. There is no claim that the assured died from any of the causes specifically named in the policy which would exempt the company from liability. Defendant cites many cases holding that where good health is made a condition precedent to liability under the policy a plaintiff may not recover where it has been proved the condition precedent was not complied with. But these cases do not consider whether such a defense is applicable where the policy contains an incontestability clause of the kind which existed here. The reason for the incontestability clause and the construction to be given to it is well stated in Jewell v. Mutual Life Ins. Co., 313 Ill. 161. The Supreme court said:

"Clauses in life insurance policies known as 'incontestable clauses' are in general use, and in this state (Laws of 1921, page 432) and in other states are now required by statute. In the earlier development of insurance contracts, it not infrequently occurred that after the insured had paid premiums for a large number of years, the beneficiaries under the policies found, after the maturity thereof by the death of the insured, that they were facing a law suit in order to recover the insurance; that in certain answers in the application it was said by the insurer, the insured had made statements which were not true. ** Recognizing this fact and seeing the effect of it on

incontestability clause of the policy is provided upon the
existence of good health at the time the benefit certificate was
issued and that in the absence of good health at the time the
certificate was issued it is not enforceable. The incontestability clause
applies. In other words, that recovery is provided by the
insurer's ill health at the time the certificate was issued and the
false and fraudulent representations made by him in order to get the
certificate issued. Recovery is provided to the extent the premium paid
by the insured.

The language of this insurance certificate was taken by
the insurance company and it is evident that it is contained literally
in favor of the insured. (See Wells v. Mutual Life Insurance Co.,
200 Ill. App. 441; Wells v. Mutual Life Insurance Co., 279 Ill. App.
2, 1937. This was more than one year after the issue of the policy
and the incontestability provision had gone into effect. There is
no claim that the insured died from any of the causes specifically
named in the policy which would exempt the company from liability.
Recovery is made on many cases holding that good health is made a
condition precedent to liability under the policy a liability may
not recover where it has been proved the condition precedent was not
complied with. But there seems to be no consideration whether such a
clause is applicable where the policy contains an incontestability
clause of the kind which existed here. The clause for the incontestability clause and the condition to be given as it is well
stated in Wells v. Mutual Life Ins. Co., 279 Ill. App. 2, 1937.

"Whereas in life insurance policies known as 'incontestable
clauses' are in general use, and in this state (Ill. 1931, page
482) and in other states are now required by statute. In the earlier
development of insurance contracts, it is not infrequently occurred that
after the insured had paid a premium for a policy, the insured
and beneficiaries under the policy found, after the maturity thereof
or the death of the insured, that they were taking a loss and in order
to recover the amount that in certain matters in the application
it was made by the insured, the insured had made statements which were
not true. ... Respecting this fact and setting the effect of it on

the insurance business, numerous insurance companies inserted in their policies what is now known as an incontestable clause. The incontestable clause now in general use is to the effect that the policy shall be incontestable after a certain period, as one or two years, except for defenses recited therein. *** This clause amounts to an agreement between the insurer and the insured that after the expiration of such period, the company shall be estopped from contesting the policy or setting up any defense, except such as may be reserved therein. *** The stipulation *** recognizes fraud and all other defenses and constitutes a short statute of limitations in favor of the insured, the purpose of which is to fix a limited time in which the insurer must ascertain the truth of the representations made, and in such case of a breach of warranty, the insurer must, under this clause, assert its claim, within the two year period, either by affirmative action, or by defense to a suit brought on the policy by the beneficiary within two years. (Monahan v. Met. Life Ins. Co., 233 Ill. 136; Neil v. Federal Life Ins. Co., 264 Ill. 425; Planigan v. Federal Life Ins. Co., 231 Ill. 399; Royal Circle v. Scherrath, 204 Ill. 549.)"

Other Supreme court cases to the same effect are: Ramsey v. Old Colony Life Ins. Co., 297 Ill. 592; Planigan v. Federal Life Ins. Co., 231 Ill. 399; Neil v. Federal Life Ins. Co., 264 Ill. 426. The appellate court cases to the same effect are: Kanter v. Continental Assurance Co., 251 Ill. App. 272; Bethke v. Cosmopolitan Life Ins. Co., 262 Ill. App. 526; James v. National Life and Accident Ins. Co., 265 Ill. App. 436; Baker v. Prudential Ins. Co., 279 Ill. App. 5, at p. 10.

Defendant makes the further contention that because defendant demanded trial by jury and the cause was placed on the regular jury calendar, the motion judge of the Municipal court was without jurisdiction to enter a summary judgment. It is conceded the Municipal court of Chicago has such power, but defendant says that the motion judge of the Municipal court has powers only similar to those of a master in chancery or commissioner sitting for the purpose of determining the regularity of the pleadings and entering orders for their amendments and nothing further. Marrone v. Shrat, 175 Ill. App. 649, and other cases are cited. None of them sustains any such contention. As a matter of law, there was no defense to this claim on the uncontradicted facts. The Municipal court properly entered the judgment. It is affirmed.

JUDGMENT AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

40449

In the Matter of the Estate of
JOSEPH J. REITER, Deceased.

On Appeal of HELEN DOLD,
Appellant,

vs.

MARIE A. REITER and AGNES A. REITER,
Administratrices of the Estate of
Joseph J. Reiter, Deceased,
Appellees.

57A
APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

299 I.A. 632⁴

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Claimant, Helen Dold, filed her demand for \$500 against the estate of Joseph J. Reiter in the Probate court of Cook county and also a petition praying its allowance as of the fifth class. The Probate court allowed the claim as of the sixth class and denied the prayer of the petition for preference. Claimant appealed to the Circuit court which, July 13, 1936, entered an order directing her claim be allowed as of the sixth class. Claimant has appealed to this court.

It is contended the claim should have been allowed as of the fifth class because it is a trust fund within the meaning of clause 5 of section 70 of the Administration Act (Ill. State Bar Stats., 1937, chap. 3, par. 71, p. 78.)

From the pleadings and facts stipulated it appears Joseph J. Reiter died August 7, 1936. In his lifetime he conducted a real estate, mortgage and insurance business at 1543 West 51st street, Chicago. September 1, 1936, the Probate court entered an order giving leave to the administratrices of his estate to carry on the business for 90 days, which they did. At the death of Joseph J. Reiter the claimant was the holder of a note for \$6500, executed by Harry A. Larke and Anna Larke, his wife, on July 30, 1924, due 5 years from date and at maturity extended by agreement for five years.

10000

In the event of the death of
the person named in the above
certificate, the same shall be
valid for the purpose of the
above certificate.

100

WITNESSES: JAMES A. HENRY and JAMES A. HENRY,
Administrators of the Estate of
James A. Henry, Deceased, 10000.

10000

10000

10000

10000

10000

This note had been reduced by payments to the principal amount of \$4500, and payment thereof had been assumed by Carmen Arcieri and Helen Arcieri, his wife, who in the year 1925 purchased the real estate known as 6205 South Washtenaw Avenue, Chicago, which had been conveyed to Joseph J. Reiter as trustee to secure the payment of the indebtedness represented by the note. By their terms the note and interest coupons were payable "at the office of Joseph J. Reiter in Chicago, Illinois, or such other place in said City as the legal holder thereof may from time to time in writing appoint."

Prior to the death of Joseph J. Reiter the Arcieris often made payments of interest at the offices of the deceased, who thereupon notified Helen Dold of such payments and upon surrender of the interest coupons would turn over to her the moneys so paid. October 27, 1934, the Arcieris paid to deceased \$500 for which he issued a receipt showing it was to be applied in reduction of the principal indebtedness. The extension provided for interest payments on January 30 and July 30 of each year and for "the privilege to pay \$500.00, or more, on any interest-due date." This \$500 paid October 27, 1934, is the subject matter of this controversy. The books and records of deceased contain accounts known as "Notes Payable Account", "First Mortgage Loan Account" and "D'---Miscellaneous Accounts." The "Notes Payable Account" shows the following entries of notes made by deceased and delivered to the claimant, Helen Dold, or her order:

Date of Note	Amount of Note.	Amount of Interest	Date of Maturity
October 4, 1934	\$2000.00	6% per annum	On or before 3 years after date
December 14, 1934	1000.00	6% per annum	3 years after date
January 5, 1935	1000.00	6% per annum	3 years after date
May 19, 1936	1500.00	6% per annum	3 years after date

The claim of Helen Dold based upon the notes above described

was filed in the Probate court of Cook county and allowed as a non-preferred claim and is not involved in this appeal. The payment of \$500 made to Joseph Reiter and subsequent entries regarding it appear on the books of Reiter as follows:

IN CASH BOOK:	Debit	Credit
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October 27, 1934---	First mortg. loan---Arcieri---	
	357 Carmen Arcieri payment	\$500.00

IN LEDGER:	Debit	Credit
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	"First Mortgage Loan Account"	
October 27, 1934---	Arcieri R 357---Arcieri pay-	
	ment---C 23	\$500.00

The books show no further entries from October 27, 1934, up to July 31, 1936, on which date these entries appear:

IN JOURNAL	Debit	Credit
------------	-------	--------

July 31, 1936----	First Mortgage Loan a/c	\$500.00
	----Helen Dold	\$500.00
	Arcieri Payment Loan	
	R 357 made 10/27/34	

IN LEDGER:	Debit	Credit
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	"D miscellaneous Accounts"	
July 31, 1936----	Helen Dold---Arcieri R 357---	
	payment 10/27/34 J 146	\$500.00

The books of the deceased do not contain information indicating that Reiter during his lifetime gave notice to the claimant of the payment of this \$500 and the employees (manager, etc.) of Reiter since October 27, 1934, have no knowledge whether such notice was or was not given by the deceased to claimant. The Arcieri mortgage loan provided for the payment of 6% interest at semi-annual due dates. As soon thereafter as payment of interest had been made to Joseph J. Reiter by the Arcieris he would pay to

was filed in the Federal court of New York and allowed as a
non-prosecuted claim and is not included in this report. The pay-
ment of \$5000 made to Joseph Heller and subsequent entries regarding
it appear on the books of Heller as follows:

IN CASH PAID: \$5000.00

PAID TO JOSEPH HELLER, \$5000.00
PAID TO JOSEPH HELLER, \$5000.00

IN CASH PAID: \$5000.00

October 27, 1934 - \$5000.00
October 27, 1934 - \$5000.00

The books show no other entries for Heller, J. Heller,
or any other name in the year 1934.

1934

July 31, 1934 - \$5000.00
July 31, 1934 - \$5000.00
July 31, 1934 - \$5000.00

IN CASH PAID: \$5000.00

July 31, 1934 - \$5000.00
July 31, 1934 - \$5000.00
July 31, 1934 - \$5000.00

The books of the company do not contain information relat-
ing to Heller during his lifetime have been to the company
of the payment of this \$5000 and the company (Heller, etc.) of
which Heller was a member, and no knowledge whether the
books are or are not given by the company to Heller. The
company's records show payment of \$5000 to Heller as
Heller's share of the company. The company's records of Heller
and Heller's share of the company are not included in this report.

claimant \$135, 6% of \$4500, and the sum of \$4500 constituted the balance due on the mortgage note held by claimant without deduction of the \$500 payment which was made October 27, 1934. The last payment of interest made ^{by} the deceased during his lifetime to claimant appears on his books and records thus:

IN CASH BOOK:	Debit	Credit
February 4, 1936---Interest Arcieri R 357 /30		
Helen Dold		\$135.00

Some time after the death of Reiter which occurred August 7, 1936, the attorney for his estate submitted to Helen Dold for her signature her claim against the estate, which had been prepared by Joseph A. Ricker, from information received by him from the administratrices. The claim showed in addition to demands for notes payable to her and executed by deceased an item of \$500 which was the payment made October 27, 1934. A few days thereafter claimant called at the place of business of deceased and of the administratrices of his estate and inquired why she had never been informed that \$500 had been paid on her mortgage note. Mr. John M. Krump with whom she talked told her he had not been given authority by deceased to speak with her about the matter, as deceased in his lifetime undertook to personally handle deals of that nature. For more than 15 years immediately preceding the death of Joseph J. Reiter, Mr. Krump was one of his trusted employees, during most of that time acting as manager of the business. Claimant during that time often dealt with Mr. Krump in connection with her transactions with the firm of Joseph J. Reiter. In November, 1936, claimant advised the administratrices that she desired to sell the Arcieri note which showed an unpaid principal balance of \$4500. She was advised by Mr. Krump, office manager, that they would endeavor to sell the same for \$4000, the amount remaining due, and she then turned the mortgage over to the administratrices to sell.

claimant \$100,000, of which \$50,000 was paid to the claimant in the form of a cash note dated by claimant without consideration of the \$500 payment which was made between 1934 and 1935. The last payment of interest made by the claimant during his lifetime in relation to the above claim appears on the books and records of the claimant as follows:

Year	Amount
1934	\$100.00
1935	\$100.00

Some time after the date of death when account books were examined, the attorney for the estate submitted to him a bill for her services for claimant's estate and account, which had been prepared by Joseph A. Miller, from information received by him from the administrators. The claim stated in addition to the amount of \$500 which was payable to her and received by her as interest on loan of \$500 which was the payment made October 27, 1934. A few days thereafter claimant called at the office of business of deceased and of the administrators of his estate and inquired why the bill never been returned. That \$500 had been paid as per mortgage note. Mr. John W. Smith, with whom she talked, told her he had not been given authority by deceased to speak with her about the matter, he possessed in his lifetime authority to personally handle claims of that nature. For more than 15 years immediately preceding the death of Joseph J. Miller, Mr. Kump was one of his trusted employees, being most of that time acting as manager of the business. Claimant during that time was with Joseph J. Miller, in connection with the business, and advised the administrators that she desired to sell the business and that she would be willing to pay the balance of \$500.

She was advised by Mr. Kump, office manager, that they would endeavor to sell the same for \$4000, the amount remaining due, and that the balance over to the administrators to pay.

The administratrices then caused to be put on the note an endorsement showing the payment of \$500. The mortgage was sold by the administratrices for \$4000, which was paid to claimant and she was advised by Mr. Krump to file a claim in the Probate court against the estate of Joseph J. Reiter.

The question for decision here upon the stipulated facts is whether this claim is for money received by the deceased "in trust for any purpose" within the meaning of clause 5, section 70 of the Administration Act. We might be disposed to hold that it is, were it not for the narrow construction put by the courts (including our own) upon the 6th clause (now the 5th) of section 70. We have recently given consideration to this question in connection with another claim against this estate. Our opinion will be found in the Matter of the Estate of Joseph J. Reiter, deceased, 298 Ill. App., 313. We there quoted with approval from the opinion of this court in Merchants' Loan & Trust Co. v. Aulette, 137 Ill. App. 161 (Abst.) as follows:

"It has been repeatedly held by the courts of this state that the word 'trust' as used in the 6th clause (now 5th clause) applies only to technical or express trusts, and that it has no application to trusts which the law implies as growing out of contracts. Felsenthal v. Kline, 214 Ill., 121; Svanoe v. Jurgens, 144 Ill., 507; Ward v. First National Bank, 100 Ill. App., 70; Shipherd v. Furness, 153 Ill., 590; Wilson v. Kirby, 83 Ill. 536; Jarrett v. Johnson, 216 Ill., 212. We are clearly of the opinion that the facts in this case do not establish an express or technical trust. The trial court therefore properly placed the claim in the seventh class. (Now 6th class).

In Felsenthal v. Kline, 214 Ill., 121, the Supreme court said: "We have uniformly held that the word "trust" as used in the sixth (now fifth) clause, is not to be taken in its general sense as embracing every case in which a confidence has been reposed, but must be understood in the restrictive sense, and applies only to technical trusts, having no application to trust which the law implies as growing out of contracts. (Wilson v. Kirby, 83 Ill. 536; Svanoe v. Jurgens, 144 id., 507; Shipherd v. Furness, 153 id. 590.) There is no construction of the facts in this case which can bring it within the definition of a trust as defined by these decisions, and the courts below have each properly placed it in the seventh (now sixth) class."

These remarks are applicable to the facts presented by this

The administration expenses were shown to be paid on the note and interest-
ment showing the payment of \$800. The mortgage was sold by the
administration for \$400, which was paid to plaintiff and the was
assigned by Mr. King to life estate in the proceeds court against
the estate of Joseph T. Reister.

The question for decision here was not the administration costs

is whether this claim is for money received by the deceased in
trust for any purpose within the meaning of clause 6, section 70
of the Administration Act. We might be disposed to hold that it
is, were it not for the narrow construction put by the courts
(including our own) upon the 6th clause (now the 32nd) of section
70. We have recently given consideration to this question in con-
nection with another claim against this estate. Our opinion will
be found in the latter of the two cases, Ward v. Ward,
208 Ill. App., 313. We there quoted with approval from the opinion
of this court in Hendricks' Loan & Trust Co. v. Ward, 187 Ill.

App. 181 (App.), as follows:

"It has been repeatedly held by the courts of this state
that the word 'trust' as used in the 6th clause (now 32nd clause)
applies only to technical or express trusts, and that it has no
application to trusts which the law implies as growing out of
the relation of the parties to the property. Ward v. Ward, 187 Ill.
App. 181, 208 Ill. App. 313. Ward v. Ward, 187 Ill. App. 181, 208
Ill. App. 313. Ward v. Ward, 187 Ill. App. 181, 208 Ill. App. 313.
We are clearly of the opinion
that the facts in this case do not establish an express or technical
trust. The trial court therefore properly placed the claim in the
seventh clause. (Now 32nd clause.)
In Ward v. Ward, 187 Ill. App. 181, the supreme court
said: 'We have uniformly held that the word "trust" as used in the
sixth (now 32nd) clause, is not to be taken in its general sense as
embracing every case in which a confidence has been reposed, but
must be understood in the restrictive sense, and applies only to
technical trusts, having no application to trusts which the law
implies as growing out of contract. (Ward v. Ward, 187 Ill. App. 181, 208
Ill. App. 313. Ward v. Ward, 187 Ill. App. 181, 208 Ill. App. 313.)
There is no construction of the facts in this case which can bring
it within the definition of a trust as defined by these decisions,
and the courts below have each properly placed it in the seventh
(now sixth) clause.'"

These remarks are applicable to the facts presented by this

record. Claimant does not assert that she is able to trace her trust fund into the estate of Joseph J. Reiter as did claimant in 298 Ill. App., 513. It follows that the judgment of the Circuit court will be affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

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40462

LUNDE & BUSWELL, INC., a Corporation,)
Appellant,)

vs.

TREMONT MOTORS, INC., a Corporation,)
Appellee.)

58A
APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

299 I.A. 823

MR. JUSTICE WATCHETT DELIVERED THE OPINION OF THE COURT.

In an action on contract against three corporations, Fred Hawkins, Inc., Hawkins Tremont, Inc., and Tremont Motors, Inc., on account of premiums alleged to be due on insurance policies as per schedule attached to the statement of claim, the first two named corporations defaulted and judgment was rendered against them. Tremont Motors, Inc., filed an affidavit of merits denying liability. There was a trial by the court with finding for defendant and judgment from which plaintiff appeals.

The statement of claim averred that all the policies for which premiums were claimed to be due were delivered to defendants and accepted by them. The statement further charged, "That the said defendants are interlocking and successor corporations to each other, and became successors without full compliance with the Bulk Sales Law of the State of Illinois, and that by reason thereof each and all thereof have become and are now jointly and severally liable for the entire amount of demand."

Tremont Motors, Inc., denied in its affidavit of merits that the policies listed in the schedule were purchased or secured for or on its behalf; denied it was liable for collection and payment of premiums said to be due; denied the policies ^{or} any of them were delivered to the defendant by plaintiff or accepted by defendant, and denied that it was an interlocking or successor corporation with respect to co-defendants, or that it purchased any of its assets from either co-defendant, or that it failed to comply with the Bulk

(, HALLIDAY, 1901, 1902, 1903, 1904, 1905, 1906, 1907, 1908, 1909, 1910, 1911, 1912, 1913, 1914, 1915, 1916, 1917, 1918, 1919, 1920, 1921, 1922, 1923, 1924, 1925, 1926, 1927, 1928, 1929, 1930, 1931, 1932, 1933, 1934, 1935, 1936, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2

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1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the Americas (CLA) in the United States. The Commission is therefore unable to determine whether the CLA is active in the United States or whether it is merely a propaganda organization.

Sales Law.

The evidence tended to show that defendants successively engaged in the general automobile and automobile accessories business, first, as Fred Hawkins, Inc., at 2240 South Wabash Avenue, afterward as Hawkins Tremont, Inc., at 30 East Lake Street, Chicago. As a matter of fact, these two corporations were not separate and distinct. Fred Hawkins, Inc., merely changed its name to Hawkins Tremont, Inc. Day 29, 1936. Peter Tremont acquired the holdings of his former associate, Fred Hawkins, in the two corporations first named. At that time it would appear Peter Tremont was a heavy creditor of the corporation. June 22, 1936, Tremont notified the creditors of Fred Hawkins, Inc., that he had on Day 29 acquired the interest of Fred Hawkins in the corporation for the purpose of preventing an unavoidable forced liquidation of the business with a heavy loss to creditors and total loss to stockholders; that more thorough investigation had disclosed that under the then circumstances the corporation could not function properly because of its inability to meet obligations with depleted assets; that the financial condition of the corporation was that there were liability accounts payable for \$10,264.33 including claim due to the State of Illinois to the amount of \$2,724.05, which was a preferred claim; and there were notes payable of \$8,220; accrued payroll and interest was \$707.68, and factory accounts payable \$942.40. This, the statement said, did not include accounts payable to the finance company, the greater portion of which was believed to be secured; that the assets consisted chiefly of accounts and notes receivable to the approximate amount of \$10,982.90, the actual value of which was doubtful. The only other assets were equities in used cars, approximately \$5,000, and the machinery and fixtures located in the premises carried on the corporation's books as of the value of \$4,700. The notice went on to say that a plan had been formulated which was con-

ditional upon its acceptance by the creditors by which one of the officers and stockholders, to regain part of a substantial investment, was willing to advance more for the business; that this additional money would enable the company to pay the creditors a sum equal to 20% in cash in settlement. The notice pointed out that a forced liquidation would mean tremendous loss to creditors and strongly urged acceptance of the offer. The statement was signed by Freeman & Freeman, attorneys for Tremont.

June 26, 1936, Peter Tremont notified the creditors that on July 1, 1936, he had purchased the entire assets of Hawkins Tremont, Inc., for \$4,100 and would pay the creditors 20% in composition of their demands. No creditor, so far as the record shows, made any objection but plaintiff refused to accept the 20% offered to it.

June 29, 1936, Peter Tremont caused the defendant Tremont Motors, Inc., to be incorporated. The stock consisted of 100 shares common and of par value of \$100 a share with 50 shares issued (\$5,000 consideration) to be received therefor, and the estimated value of property to be owned for the following year, \$10,000. The gross amount of business to be transacted during the year was estimated at \$50,000. Incorporators were Peter C. Tremont, Harry I. Freeman and A. Kornfeld. On the first day of July, 1936, this corporation went into the premises theretofore occupied by the other defendant corporations and took over the business purchased from Tremont. The business was later removed to 4838 Cottage Grove ave.

The evidence does not show that any of the policies of insurance (all of which were outstanding at the time the Tremont Motors, Inc., was incorporated) were ever delivered to it. It does show that Peter Tremont requested the assignment of these various policies to the new corporation and that plaintiff endorsed them but the insurance companies refused to accept the endorsement and, as a matter of fact, on August 13, 1936, cancelled the policies for non-payment

of premiums.

Plaintiff argues in the first place that the Tremont Motors, Inc., is liable on the theory that the directors of an insolvent corporation are trustees for the creditors and may not purchase the trust property to secure an advantage to themselves over the creditors. All this is quite true, but plaintiff did not sue on that theory nor try its case on that theory. The record shows no suggestion either in the pleading or the evidence that defendant corporation was liable in a suit at law because there had been a fraudulent transfer of property to it by the former corporation. That such was not the theory is evident from the fact that Peter Tremont from whom defendant corporation took title was not made a party to the suit. No judgment can be taken against him in this proceeding. Plaintiff cannot in this court secure the reversal of a judgment on a theory never presented to the trial court.

Hayward Co. v. Juddorff-Bisnell Co., 365 Ill., 537; Remington . . .
Ernst & Ditt, Inc., 299 Ill. App., 48; National Loan Co. v. Swords
Co., 290 Ill. App., 42; Lawson v. Terjorian, 293 Ill. App., 431.

Plaintiff, however, suggests that in the Municipal court in a suit on contract the rights of the parties depend on the evidence and are not controlled by the pleadings. It cites Walsh v. Fallis, 266 Ill. App., 341, and Wertheimer v. Glanz, 277 Ill. App. 339. These cases are not applicable to this record. It is true that this court will not in this class of cases where an issue has been tried out reverse merely in order to require parties to file better pleadings. These and other cases so hold. We have never held that this rule will be applied in a case where a party seeks a reversal on an issue never presented in any way to the trial court and urged for the first time in the Appellate court. The unfairness of such a practice must be apparent.

Plaintiff also contends defendant should be held liable on the theory that where one corporation makes a conveyance of its

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property to another for the purpose of defrauding creditors the grantee corporation will be charged with notice where the president and directors of the grantor were also president and directors of the grantee corporation. Plaintiff points out that Peter Tremont was an officer of Hawkins Tremont, Inc., and was also the purchaser at the sale of its property, and that on July 1, 1936, when he transferred this property to Tremont Motors, Inc., he was its president also and one of the incorporators of it, and, as a matter of fact, the sole owner. Assuming all this to be true, we cannot see on what theory this would make the new corporation liable for insurance delivered to the old one. No evidence was introduced tending to show the sale was in fact fraudulent, and if it were the remedy would not be by suit at law to hold the defendant corporation liable. The cases cited by plaintiff to this point are Simmons v. Roseland Security Trust Co., 181 Ill., 563, and Sherwin-Will. Co. v. Watson Industries, 361 Ill. 593. An examination discloses that these cases were not suits at law and are in no wise applicable to this record. There was no proof of combination, consolidation or merger. The mere sale of the property of one corporation to another does not make the vendee corporation liable for the vendor's debts in absence of fraud. Fletcher Encyclopedia of Corporations, vol. 15, secs. 7124-7126, pp. 169-176.

It is apparent the controlling question in the case is raised by the contention of the plaintiff that the sale of the chattels of Hawkins Tremont, Inc., to Tremont was invalid under the Bulk Sales Law because of the failure of the vendee to give at least 5 days notice to creditors before consummation of the sale as required by that Act. The statute is found in Ill. Revised Statutes, 1937, chap. 121 $\frac{1}{2}$, sec. 78, p. 2817. The Act in substance provides that sales of merchandise or other goods and chattels of the vendor's business otherwise than in the ordinary course of trade and in the

regular and usual prosecution of the vendor's business shall be fraudulent and void as against the creditors of the vendor "unless the said vendee shall, in good faith, at least five (5) days before the consummation of such sale, transfer or assignment, demand and receive from the vendor a written statement under oath of the vendor or a duly authorized agent of the vendor having knowledge of the facts, containing a full, accurate and complete list of the creditors of the vendor, their addresses and amounts owing to each as near as may be ascertained, and if there be no creditors, a written statement under oath to that effect," and "unless the said vendee shall at least five days before taking possession of said goods and chattels and at least five days before the payment or delivery of the purchase price, or consideration of (or) any evidence of indebtedness therefor, in good faith, deliver or cause to be delivered or send or cause to be sent personally or by registered letter properly stamped, directed and addressed, a notice in writing to each of the creditors of the vendor named in the said statement or of whom the said vendee shall have knowledge, of the proposed purchase by him of the said goods and chattels and of the price, terms and conditions of such sale: Provided, however, that it shall be lawful for the vendee to pay to the vendor so much of the purchase price as shall be in excess of the total amount of the indebtedness of the vendor, before the expiration of the five days hereinbefore referred to."

Section 2 of the Act provides in substance that any vendor who makes such sale or any person making such sale for or on behalf of such vendor who shall knowingly and wilfully make or deliver or cause to be made or delivered any false statement or any statement which in any material portion is false, or shall knowingly or wilfully fail to include the names of all the creditors of the said vendor in said statement as provided in the Act, "shall be guilty of a misdemeanor," etc.

Par. 80a, sec. 4, provides that any creditor or creditors of the vendor in case of a sale contrary to the provisions of the Act, "may pursue his remedy either at law or in equity, against either the vendor or vendors, the purchaser or purchasers, jointly or severally, or against the whole or any part of such stock or merchandise, merchandise and fixtures, or other goods and chattels, by a suit either at law or in equity, without having reduced his claim to judgment; and the court in which said suit is pending shall have jurisdiction to adjust the rights and equities of all parties having an interest in the property in such proceedings."

The statement of claim here does not disclose any suit brought under this section nor could any such suit be maintained under the facts disclosed by the evidence. The proof shows, we think, sufficient compliance with the provisions of the Bulk Sales Act in the sale made June 22 to Tremont. It is suggested that the notice was insufficient because it was not sent out "at least five days" before the sale, but only four days. The evidence shows that the notices were mailed to the creditors by registered mail on June 26, 1936, and that the sale was completed July 1, 1936. There is in evidence a registered receipt of the notice signed by plaintiff, dated June 27, 1936. It seems clear this met the requirements of the statute and the cases so hold. Fiedler v. Bokfieldt, 355 Ill. 11; Midland Oil Co. v. Packers Motor Transport, 277 Ill. App., 451. These cases hold that the Bulk Sales Law is to be strictly construed because it is in derogation of the common law, and that the proper method of computing time within the meaning of the statute is to exclude the first day and include the last. Other cases to the same effect are Brace v. City of Chicago, 117 Ill., 11; Gordon v. People, 154 Ill., 664; People v. Snow, 279 Ill., 289. Moreover, the purpose of requiring notice to be given under the Bulk Sales Act is that creditors may take such action as they may deem necessary before the

consummation of the sale. Tally v. Schoenholz, 224 Ill. App. 158; Tipword v. Ross, 273 Ill. App., 1. As defendant points out, plaintiff with full information took no steps to prevent the consummation of the sale and did not bring this action until nearly 7 months after it was completed.

There is no proof in this record that the assets transferred to Tremont were worth more than Tremont paid for them. Indeed there is not a scintilla of evidence in the record tending to show the actual value and therefore ^{no} evidence tending to show fraud in that respect. There is no proof that Tremont Motors, Inc., agreed to pay the debts of Hawkins Tremont, Inc., and without such agreement, in the absence of proof of fraud, there could be no liability. The statement of claim asserts the existence of "interlocking corporations." There is no proof of this. On the contrary the proof shows without question that each corporation had an independent franchise and was a distinct entity. The facts that two corporations were organized for the same or similar purposes, or that certain directors of one might be directors of the other, were not sufficient to show a legal consolidation. Christopherson v. Patton, 220 Ill. App., 290; Wheeler v. Acme Harvesting Machine Co., 175 Ill. App., 69. Defendant points out it is highly significant that the claimed transfer of the insurance policies to defendant was not even mentioned in plaintiff's affidavit of merits. Nor is there proof that at any time any insurance contract existed on which the defendant corporation could have recovered in case of loss.

Plaintiff contends that a new trial should have been awarded because of newly discovered evidence tending to show that a payment had been made to defendant corporation by the Chicago Park District in discharge of a debt due to Fred Hawkins, Inc. Inasmuch as all the assets of Fred Hawkins, Inc., were transferred to Tremont and by Tremont sold to defendant corporation, the defendant corporation

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and amount of development area, and animal health.

was clearly entitled to receive such payment. The whole evidence
if
shows that plaintiff is entitled to any remedy it is by way of
complaint in equity rather than by suit at law. The judgment of
the trial court is therefore affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

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40478

CHICAGO TITLE AND TRUST COMPANY,
a Corporation, as Successor-Trustee,
Complainant,

vs.

MAX ASTRAHAN et al.,
Defendants.

NORMAN M. MERTES, Petitioner,
Appellee,

vs.

GERTRUDE LEVINE, Respondent,
Appellant.

59A
APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

299 I.A. 623²

MR. JUSTICE LATCHETT DELIVERED THE OPINION OF THE COURT.

By an amended notice of appeal filed August 30, 1938, Gertrude Levine seeks to reverse an order entered on August 22, 1938, in and by which the receiver of certain premises under foreclosure was directed to turn the same over forthwith to petitioner, Norman M. Mertes, the receiver to file his account and report of receipts and disbursements within 5 days, and to turn over to Mertes all rents accruing after July 20, 1938.

The material facts appear to be that on the 29th day of October, 1931, the Madison-Wedzie State Bank, predecessor trustee, filed its bill of complaint against Max Astrahan and Dina Astrahan, his wife, to foreclose a trust deed executed by the defendants on March 21, 1927, conveying certain premises in Cook county, to secure an indebtedness of \$72,500, represented by an issue of bonds to that amount. Attached to the bill was a copy of the trust deed, bonds, etc. The bill was in the usual form and prayed the relief usually allowed in such cases.

June 2, 1936, Gertrude Levine filed her petition in the cause, averring that she was the owner of the equity of redemption of the premises described, having derived title thereto by quit-

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U. S. DEPARTMENT OF JUSTICE

TO :

FROM :

SUBJECT :

REFERENCE :

RE: JAMES EARL RAY, AKA; ALIASES; ET AL.

On or about August 1, 1968, at Memphis, Tennessee.

James Earl Ray, known to the FBI as "RAY", is a white male, born August 14, 1928, in Mississippi. He is a member of the Black Panther Party and has been active in the civil rights movement. He is currently in custody of the FBI at the Memphis Federal Penitentiary. He is being held on a charge of murder in connection with the assassination of Dr. Martin Luther King, Jr. on April 4, 1968. He is being held on a charge of murder in connection with the assassination of Dr. Martin Luther King, Jr. on April 4, 1968.

The following information was obtained from a review of the files of the FBI Memphis Office. On or about August 1, 1968, at Memphis, Tennessee. James Earl Ray, known to the FBI as "RAY", is a white male, born August 14, 1928, in Mississippi. He is a member of the Black Panther Party and has been active in the civil rights movement. He is currently in custody of the FBI at the Memphis Federal Penitentiary. He is being held on a charge of murder in connection with the assassination of Dr. Martin Luther King, Jr. on April 4, 1968. He is being held on a charge of murder in connection with the assassination of Dr. Martin Luther King, Jr. on April 4, 1968.

Very truly yours,

Special Agent in Charge

claim deed from Harold Cusack on April 17, 1935. Her petition also averred that she was in possession of the premises under a lease from the receiver and was the owner of the furniture, equipment, etc., located on the premises; that she was not advised of the things alleged in the complaint save from the complaint itself, and she had not been made a party defendant and prayed that leave be granted her to become such, and that her petition might stand as her answer to the complaint. She was granted leave to file her petition, and an order entered as prayed on June 2, 1936.

November 19, 1936, a decree of foreclosure was entered, the Chicago Title and Trust Company Having in the meantime succeeded the Madison-Kedzie State Bank as trustee. The matter was heard upon the report of a Special Commissioner, and no exceptions were filed to the report. The decree found \$97,356.31 to be due; also found the rights and interest of John M. Krasa, holder of a second mortgage for which Harold Cusack was found to be personally liable, and directed that in further default of payment the premises should be sold by the Special Commissioner. The decree contained all the usual provisions of such decrees.

March 2, 1937, the special commissioner filed his report of sale to the effect that Kathryn A. Stevens, pursuant to a plan of reorganization, offered and bid for the premises \$6700, and that being the highest and best bid he had sold the premises to her for that amount. March 2, 1938, the report of the special commissioner came on for hearing and upon the motion of the several parties constituting the Bondholders' Protective Committee, the court approved the same. The report stated that the bid of \$6700 was by Kathryn A. Stevens, bidding in behalf of first mortgage bondholders who had deposited their bonds with the committee, "said bidder being the nominee of the committee"; that there had been deposited with the committee bonds in the aggregate principal amount of \$58,000 out of a total principal

claim does that Harold Gurnea on April 17, 1932. Her action also
secured that she was in possession of the premises under a lease
from the receiver and was not subject to the L. L. Lease, Amendment
No. 1, passed on the premises; that she was not advised of the
change effected in the ownership of the premises until, and
she had not been made a party defendant and judgment was entered
against her in the same case, and that her rights should stand as
her interest in the premises, and was provided for in the law
petition, and in order that she should be paid in full, 1932.
February 10, 1932, a letter of introduction was written,
The Chicago Title and Trust Company, Inc., in the following substance:
The Chicago Title and Trust Company, Inc., Chicago, Illinois, has been
the report of a special commission, and no resolution was filed
in the report. The report was filed on May 10, 1932, and the
the rights and interests of the L. L. Lease, Amendment No. 1, should be
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the special commission, and the report contained all the usual
the report contained all the usual provisions of such reports.

amount outstanding of \$68,000; that the Bondholders' Protective Committee had acquired the second mortgage on the premises and the equity of redemption therein, and that at the expiration of the period of redemption a corporation would be organized under the laws of the State of Illinois for the purpose of acquiring and operating the premises, and stock would be issued to the depositing bondholders on the basis of one share for each \$100 in stock deposited with the committee. The order adjudged and decreed that the special commissioner had in all respects conformed with the provisions of the decree and the law in conducting the sale, and that the sale should be and was confirmed and approved. It also directed that "said plan of reorganization proposed by said committee be and the same is hereby approved." Also that the Bondholders' Protective Committee accept non-depositing bonds for deposit for a period of 90 days from that date.

August 22, 1938, Norman M. Mertes filed his petition setting up the sale by the special commissioner on April 20, 1937, as heretofore stated. Further, that on July 18, 1938, he obtained an assignment of a judgment in favor of the Foreman-State National Bank v. Max Astrahan et al., defendant in the cause, in the Municipal court of Chicago, for \$5,517.75; that on July 18, 1938, an alias writ of execution was issued on the judgment and the execution placed in the hands of the bailiff of the court to execute; that neither Max Astrahan nor any other defendants, other heirs, administrators or assigns, or any person interested in the premises within 12 months from the date of sale had redeemed the real estate sold or any part of it; that the bailiff levied upon the premises under the execution at the request of petitioner, who desired to redeem from the sale; that at the time of redemption petitioner paid to the bailiff of the Municipal court \$7,200.27, being the amount for which the premises were sold with interest at the rate of 6% per annum from the date of sale to the

amount outstanding of \$88,000; that the bondholders' Committee had acquired the second mortgage on the premises and the equity of redemption therein, and that the expiration of the period of redemption a corporation would be organized under the laws of the State of Illinois for the purpose of acquiring and operating the premises, and stock would be issued to the depositors on the basis of one share for each \$100 in stock deposited with the committee. The order was signed and decreed that the special commissioner had in all respects conformed with the provisions of the decree and that in conducting the sale, and that the sale should be and was confirmed and approved. It was directed that "said plan of reorganization proposed by said committee be and the Committee accept non-appearing bids for the sale for a period of 90 days from that date. August 22, 1937, Herman E. L. Jones filed his petition setting up the sale by the special commissioner on April 20, 1937, as hereinbefore stated. Thereafter, that on July 18, 1937, he obtained an assignment of a judgment in favor of the Foreman-State National Bank v. Max Foreman as executor, defendant in the cause, in the Municipal Court of Chicago, for \$2,515.75; that on July 18, 1937, an alias writ of execution was issued on the judgment and the execution placed in the hands of the sheriff of the county to execute; that Nathan Max Foreman nor any other defendant, other heirs, administrators or assigns, of any person interested in the premises within 18 months from the date of sale had released the real estate sold or any part of it; that the sheriff levied upon the premises under the execution at the request of petitioner, who desired to redeem from the sale; that at the time of petitioner's petition filed in the Circuit Court of Cook County, Illinois, the amount for which the premises were sold was \$7,200.27, being the amount for which the premises were sold

date of redemption; that Mortes on July 18 received his certificate of redemption from the bailiff which was duly filed for record in the office of the Recorder of Deeds in Cook county, pursuant to law; that the bailiff advertised for sale under the alias writ of execution; that on August 17, 1933, the premises were struck off and sold to petitioner for \$7,265.67, being the amount of the redemption money, interest and cost of redemption sale, and no greater bid having been made, thereupon the bailiff made, executed and delivered a deed to the premises involved in the cause to the petitioner, who is now the owner of the property free and clear of rights of all persons; that a receiver had been theretofore appointed who is now acting as receiver of the premises; that the time for redemption from said sale expired July 20, 1933, and all rights to the rents, issues and profits of the premises of the parties to the cause expired on that date. The petitioner was entitled to all the rents collected by the receiver or which accrued after said date and the receiver should be directed to turn over possession of the premises and all rents, issues and profits therefrom accruing on and after July 20, 1933. The prayer of the petition was for such an order.

The same day, August 22, Gertrude Levine filed her answer in which she asserted she was the owner of the equity, admitted certain allegations, neither admitted nor denied the assignment of the of the judgment of the Foreman-State National Bank against Astrahan on July 18, 1933, but asserted that the judgment in so far as Max Astrahan was concerned was void and of no effect for the reason that the purported judgment was obtained under an alleged power of attorney to confess judgment on a note signed by the Astrahan Investment Corporation, and guaranteed by Max Astrahan; that the power to confess judgment was executed by the corporation which was the principal payor of the note; that Max Astrahan was one of the guarantors, as appeared from a certified copy of the transcript of the proceedings in the Municipal court, which was attached to and made a part of the

answer. She, therefore, averred that the alias writ of execution issued on the judgment was void and of no legal effect; and further, that at the time of the alleged assignment said judgment was void in so far as defendant Max Astrahan was concerned; that the levy was void and of no legal effect, and that if a certificate of redemption was issued by the bailiff the certificate was void and of no legal effect; that if an alias writ of execution was made it was void, and the deed purporting to be executed by the bailiff of the Municipal court conveyed no better right than the bailiff had and the bailiff had no right because the execution was void. Further answering ^{as to} the receiver, she denied the petitioner was entitled to possession of the premises or any of the profits accruing after July 20, 1933; denied petitioner was the owner of the property or any part of it. She prayed the petition should be dismissed. The transcript of the proceedings in the Municipal court in the case of Foreman-State National Bank, a corporation, v. Astrahan Investment Corporation et al., was in contract No. 2757726 and the statement of claim was for money due on a promissory note executed by the corporation and unconditionally guaranteed by defendants, Mendel Astrahan and Max Astrahan. The claim was duly verified, the affidavit stating that \$5000 was due thereon against the corporation and the Astrahans; that the affiant was familiar with the signatures on the promissory note and that these were genuine. This was sworn to under date of February 17, 1932.

De Ancona and Pflaum appeared as attorneys for the plaintiff and Stuart Hertz as defendant's attorney entered appearance for defendant and confessed judgment which was entered before Judge Hartigan in the Municipal court on February 24, 1932. The note attached to the statement of claim is dated July 16, 1930. The power of attorney is in the usual form. The note is signed by the Astrahan Investment Corporation by Mendel and Max Astrahan. The power of

[illegible]

attorney on the face of the notes provides: "All the provisions hereof shall inure to the benefit of the bank and any legal holder of this note. And to further secure the payment of this note, the undersigned, and each and every guarantor and endorser hereof, does hereby authorize any attorney of any court of record to appear for him or them, or any of them in such court, in term time or vacation, at any time hereafter, and confess a judgment without process in favor of the legal holder of this note and against the undersigned ** any guarantor or endorser, or any of them, for such amount as may appear to be unpaid thereon, with cost of suit and reasonable attorneys' fees, and to waive and release all errors which may intervene in such proceedings, and consent to immediate execution upon such judgment, hereby ratifying and confirming all that said attorney may do by virtue hereof, and hereby agree that no writ of error or appeal shall be prosecuted on any judgment entered by virtue hereof, and that no bill in equity shall be filed to interfere in any manner with the operation of any such judgment." On the back of the note appears the following: "FOR VALUE RECEIVED, the undersigned do hereby jointly and severally guarantee the payment of the within note and all costs, expenses and attorneys' fees paid or incurred in the collection thereof and the enforcement hereof, and waive any and all presentment, demand, protest ** notice of dishonor, and consent to any renewal or extension of said note, without notice to them or any of them, and further consent and agree to be bound by all of the terms and conditions thereof."

Of the many questions discussed it will be necessary to consider only one, namely, whether the judgment against the guarantors in the Municipal court of Chicago was valid and binding. If it was, then the redemption was in due form and Mertes, as redemptionist, was in all respects substituted to the rights of

plaintiff, who obtained the decree of foreclosure, and would be entitled to a deed of the premises at the expiration of the period of redemption and as a matter of course to the rents and profits after the execution of the deed to him. Stoddard v. Walker, 90 Ill. App., 412; Porter v. Citizens National Bank of Evansville, 202 Ill. App., 621; Donahue v. Central Life Ins. Co., 233 Ill. App. 254.

Respondent contends that the matter was disposed of without a hearing on the facts and that this, as a matter of law, was error. She cites Blair v. Reading, 99 Ill., 611, and Gleason v. Britton, 155 Ill., 232, 40 N. E. 594. The contention cannot be sustained. The Civil Practice act was applicable and under section 40 of that act all allegations not explicitly denied were admitted and proof was not necessary. Strickland v. Washington Building Corporation, 287 Ill. App., 340. The parties seem to have understood this and the cause was submitted on the uncontradicted facts as the same appeared from the pleadings. The answer of Levine was filed on the same day as the petition of Kertes. In support of the position that the power of attorney did not authorize a judgment against Astrahan and that the judgment might be attacked collaterally three Appellate court cases are cited - Sharp v. Barr, 234 Ill. App., 314; Cohn v. Fraus, 255 Ill. App., 301; and Dulsky v. Lerner, 223 Ill. App., 228. These cases are easily distinguishable. Kertes cites two Maryland cases where under authority similar to that here conferred it was held judgment against a guarantor might be entered. Johnson v. Phillips, 143 Md. 16, 122 Atl. 7, and Brooks v. National Bank of Cockeysville (Md.), 190 Atl., 750. There are a number of Illinois Supreme court cases which hold that the question of authorization to confess judgment in cases of this kind depends upon the intention of the parties to be gathered from the entire instrument. Holmes v. Parker, 125 Ill., 476; Packer v. Roberts, 141 Ill., 9; Hagerman v. Schulte, 349 Ill., 11. Decisions of the Appellate court

are to the same effect. Sharp v. Barr, 234 Ill. App., 214. Section 6 of the Negotiable Instrument Act authorizes the joinder in suits upon promissory notes of persons who are jointly and severally liable. Many Illinois cases hold this may be done. Limmel v. Weil, 95 Ill. App., 15; Page v. W. F. Hallam Co., 212 Ill. App., 462; Geneva Cigar Co. v. Ambassador Cigars Co., 422 Ill. App., 70. The Illinois cases also hold that the same presumptions of law in favor of judgments by confession are indulged as in the case of judgments entered upon confession of process. Alton Banking & Trust Co. v. Gray, 259 Ill. App. 30; and Alton Banking & Trust Co. v. Gray, 347 Ill., 99. It is not claimed defendant Astrahan was not liable to the amount for which judgment was entered and the judgment would not be set aside even on the motion of Astrahan without a showing to the effect that he was not indebted. The answer of Levine does not deny the judgment was entered for a valid indebtedness. Moreover, Levine is a third party here in so far as this judgment is concerned. Then, too, the rights of those redeeming are liberally construed to the end that debts, in as far as possible, shall be paid. The pleading of Levine comes very far from showing that this judgment was invalid. The record shows that attorneys representing the interest of the bondholders had notice of the proceeding and of this appeal. They have not appeared. Apparently the plan of reorganization has been abandoned.

The appeal is without merit and the order is affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

RECEIVED : 5 NOVEMBER 1964

40330

ARTHUR L. PRIEGRINI,
Appellee,

vs.

WILLIAM A. BRNDENBECK,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

60A
2991.A 623³

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against defendant to recover \$1762, which he claimed was balance due him on a deposit he made with defendant under a written lease, by the terms of which defendant leased to plaintiff a gasoline service station for a period of 10 years. There was a jury trial and a verdict and judgment in plaintiff's favor for \$1488 and defendant appeals.

The record discloses that October 18, 1935, the parties entered into a written lease whereby defendant leased to plaintiff a gasoline service station for a period beginning January 1, 1936, and ending December 31, 1945, at a graduated monthly rental of from \$140 to \$200 a month for the last year. The parties seem to agree that the case is to be determined upon the meaning of a paragraph of the rider attached to the lease, the pertinent part of which is:

"Lessee *** has deposited with the Lessor the sum of TWO THOUSAND DOLLARS (\$2,000) as security for the performance by said Lessee of the covenants and agreements contained in the within lease and rider attached, and in the event of his failure to so perform, or of any breach of any and all of such covenants and agreements, and such failure or breach shall continue for a period of thirty (30) days, then and in that event the said sum of TWO THOUSAND DOLLARS (\$2,000) shall be forfeited to the Lessor as liquidated damages ***. In the event of full and complete performances of all of such covenants and agreements then said sum of TWO THOUSAND DOLLARS (\$2,000) shall apply as payment of rent for the last ten (10) months of the term of the within lease. It is understood that Lessor shall pay to the Lessee so long as the Lessee has permitted no failure or breach on his part and so long as the lease remains in force and effect interest at the rate of five (5%) per cent on said sum. Said payments to be made to the Lessee on the first of July, A. D. 1936, and semi-annually thereafter, but shall not accrue or be paid for or during the last year of the term of the within lease."

828 ALFRED

Plaintiff took possession of the premises January 1, 1936, but failing to pay the rent for May and June defendant brought forcible detainer in the Municipal court where judgment for possession was entered in his favor and plaintiff vacated the premises June 22, 1936.

Defendant's position is that he is entitled to retain the deposit because it is expressly stated in paragraph 7 of the rider that this amount was agreed upon as liquidated damages in case plaintiff failed to carry out the terms of the lease, while on the other hand plaintiff's position is that the deposit was made "as security for the performance of the covenants of the lease," and that the provision is for a penalty and unenforceable.

The undisputed evidence is that plaintiff deposited with defendant but \$1350. The jury deducted from this amount the rent for the months of May and June at \$140 a month, a total of \$280, and made an allowance of \$32, being one-half the amount defendant claimed he had expended in repairing the premises on account of plaintiff's occupation; but an examination of the itemized bill shows that a number of the items were not made necessary by what plaintiff did, and this appears to have been the view of the jury.

Defendant contends the court erred in failing to permit him to open and close the trial because the pleadings showed there was no controversy between the parties except that he had interposed an affirmative defense. Counsel in his brief says defendant admitted in the pleadings that the lease was executed and that he received the deposit. We are unable to find in defendant's answer any admission to the latter statement. The execution of the lease was admitted but there is no admission that he had received the deposit. We think the court did not err in denying defendant's motion to open and close the case.

Defendant further contends the verdict is against the manifest

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weight of the evidence and in support of this the argument seems to be that the evidence disclosed that the amount of deposit was fair and equitable under the circumstances and was therefore liquidated damages, as the rider provided, and that if defendant had not been precluded from offering testimony of witnesses as to moneys paid out by defendant in connection with the execution of the lease, "there would be no doubt left in the minds of a jury as to whether or not the defendant is indebted to the plaintiff." We think there is no merit in the point made. Defendant offered to show that before the execution of the lease he had paid \$825 to a former tenant who was occupying the premises at the time, to obtain the cancellation of his lease; that he paid \$650 to a broker for obtaining plaintiff as a tenant and paid \$200 to his attorney to draw up the lease. We think the court did not err in excluding this evidence. On the trial there was no suggestion when counsel made the offer that plaintiff knew of these expenditures, and, as said in Dunn v. Hatenberg, 303 Ill. App., 300, which was a case similar in character to the instant case, "Defendants sought to prove on the trial that at the time the lease was executed they had spent a considerable sum of money in remodeling the premises in question. The court properly excluded evidence of the amount of these expenditures. No doubt these expenditures were made for the purpose of securing the execution of the lease with the original lessee, but the lease itself did not expressly provide for any reimbursement to defendants for these expenditures other than the promise of the lessee to pay rent."

Defendant further contends that the court "erred in holding that the liquidated damages agreed upon by and between the parties was a penalty and not liquidated damages," and the case of Parker-Washington Co. v. Chicago, 167 Ill., 136, is cited. In that case plaintiff entered into a contract with the City of Chicago for the

erection of a pumping station to supply water for the use of its inhabitants and for protection against fire; and it was held it was legal to provide in the contract that plaintiff would pay \$50 a day as liquidated damages between the time fixed for completing the work and the time of its actual completion. The court there further held that the word "liquidated" in such a contract does not always determine the question whether the provision is for a penalty and not for damages, and said (p. 139): "Where the intention of the parties is in doubt the courts are inclined to construe the stipulated sum as a penalty, because the theory of the law generally is that compensation shall be the rule and the application of that rule works justice between the parties. *** In order to determine whether a stipulated sum to be paid for the breach of a contract was intended to be a penalty or liquidated damages, the court will consider the language used and the subject matter of the contract to ascertain the intention of the parties. The use of the word 'liquidated' does not always determine the question." Again, in discussing this question the court in Advance Amusement Co. v. Franke, 268 Ill. 379, said (p. 381): "As was said by this court in Gobble v. Linder, 76 Ill., 157, no branch of the law is involved in more obscurity by contradictory decisions than whether a sum named in an agreement to secure performance will be treated as liquidated damages or a penalty, and as each case must depend upon its own peculiar and attendant circumstances, general rules of law on this question are often of little practical utility. While the intention of the parties on this question must be taken into consideration, the language of the contract is not conclusive. The courts of this State, as well as in other jurisdictions, lean toward a construction which excludes the idea of liquidated damages and permits the parties to recover only damages actually sustained. *** This and all other courts seem to agree upon the principle that

a stipulated sum will not be allowed as liquidated damages unless it may be fairly allowed as compensation for the breach. We have frequently said that courts will look to see the nature and purpose of fixing the amount of damages to be paid, and if it appears to have been inserted to secure the prompt performance of the agreement it will be treated as a penalty and no more than actual damages proved can be recovered."

In the instant case we think the purpose of fixing in the rider the amount of damages, viz., \$2,000, to be paid, was to secure prompt performance by plaintiff, the tenant, of the terms of the lease. It is expressly stated in the rider that the \$2,000 is deposited "as security for the performances by said Lessee of the covenants and agreements contained" in the lease and rider.

Complaint is also made that the court invaded the province of the jury. The record discloses that after the jury retired to consider of its verdict, it returned a verdict fixing the issues for plaintiff, fixing his damages at \$362. The court then inquired of the jury as to how it arrived at that figure, and there was considerable discussion between the court and the foreman of the jury and also by counsel which clearly disclosed that the jury was confused by the figures. The court then sent the jury back and it returned a verdict for \$1488 which, as above stated, was made up of the amount of the deposit less the rent for May and June and one-half of the \$164 defendant testified he had expended to put the premises in order after plaintiff vacated them on June 22. In the colloquy between the Judge and the foreman it developed that the jury, as above said, thought the \$164 was too much. We think there was no such error as would warrant a reversal of the judgment. There was no dispute about the figures and the rent remaining due and unpaid, and the only question was as to the amount of the repair bill.

The judgment of the Municipal Court of Chicago is affirmed.

JUDGMENT AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

JOHN J. McNEELY,

The judgment of the United States Court of Appeals is affirmed. The only question was as to the amount of the recovery. It is clear that the plaintiff was entitled to the full amount of the recovery, and the court's decision is correct. The court's decision is correct and the judgment is affirmed.

between the state and the federal government. It is a matter of public policy. The court's decision is correct and the judgment is affirmed. The court's decision is correct and the judgment is affirmed.

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40351

RICHARD ALLAN DILLMAN, a Minor,
by WILLIS E. DILLMAN, his father
and next friend,

Appellant,

vs.

CONSUMERS SANITARY COFFEE &
BUTTER STORES, a Corporation,
Appellee.

61A
APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

299 I.A. 623⁴

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff, a child three and a half years old, brought suit by his father and next friend against defendant to recover damages for personal injuries claimed to have resulted through the negligence of defendant in setting fire to waste paper in the rear of its grocery store, as a result of which the paper blew against plaintiff and he was severely burned. There was a jury trial and at the close of all the evidence the court instructed a verdict for defendant, judgment was entered on the verdict and plaintiff appeals.

The record discloses defendant conducted a grocery store on the west side of Stony Island avenue 35 feet south of 32nd street, Chicago. The store was one story high and had a frontage of 48 feet and a depth of 70 feet. The lot was 129 feet in depth extending from Stony Island avenue to an alley. The rear part of the lot extending from the store to the alley, 59 feet, was vacant. Near the south part of the vacant space and about 30 or 35 feet west of the store there was an incinerator made of four posts driven in the ground, about four feet high; around these four posts was a mesh wire extending from the ground to the top, but for some time prior to the accident, April 7, 1934, the wire had broken down so that it was only about one and a half to two feet above the ground; ashes and refuse had accumulated in the incinerator. From time to time defendant took various kinds of waste paper and refuse from the store and burned it in the incinerator. Some of this was heavy

Handwritten signature or initials.

THE UNITED STATES COURT
OF DISTRICT COLUMBIA

IN SENATE
JANUARY 10, 1911
REPORT

VS.

UNITED STATES DEPARTMENT OF JUSTICE
VS. JAMES EARL RAY
ET AL.

333 I.A. 623

A. JAMES EARL RAY, Defendant.

Exhibit, a white card and a small piece of paper, was
by the writer and next found against defendant in pocket of
for personal injuries claimed to have resulted from the
period of defendant in waiting time in waiting room in
the grocery store, on a bench at which the paper was found.
plaintiff and he was (several) times. There was a large piece of
at the top of all the evidence in defendant's a variety of
defendant, it was also entered on the vertical and plaintiff's
the results of the testimony concerning a grocery store on
the west side of 33rd Street, Avenue 33, West 33rd St. of Chicago.
Chicago. The store was one story high and a building of 40 feet
and a depth of 30 feet. The lot was 120 feet in length and
from 33rd Street, facing to the north. The two ends of the lot
facing lot was open to the alley, 30 feet, two vacant, near the
small part of the vacant lot was about 10 or 20 feet wide of the
store house and an incinerator made of iron pipes driven in the
ground, about four feet high; around these four pipes was a steel
pipe extending from the ground to the top, for some time after
the fire, (about 10 feet high), incinerator was removed from the lot
and was found on the lot in the lot house (the incinerator) and
defendant took plaintiff's claim of value of the lot and the

waxed paper and some of it cardboard.

There was a one story building adjoining defendant's grocery store on the north extending 35 feet to 32nd Street and apparently to the alley on the west; a grocery store extended west from Stony Island Avenue 55 feet and in the rear of it was an apartment, next a barber shop and then another apartment, all one story in height and each having a frontage on 32nd Street of 25 feet. Plaintiff lived with his parents in the apartment near the alley; in the 25 feet immediately east of the apartment plaintiff's father conducted a barber shop; back of the apartment and the barber shop was a space about 6 feet in width immediately north of and adjoining the vacant property in the rear of defendant's store, but there was no fence.

The evidence shows that shortly before the accident, about 1:30 p. m., April 7, 1934, plaintiff was playing with a sand bucket and a shovel in the space in the rear of the apartment where he lived with his parents. There is also evidence that an employee of defendant took some papers from the store, threw them in the incinerator and set fire to them; that there was some wind from the south as well as that created by the burning papers, causing the papers to blow toward the north, and a piece of the paper wrapped around plaintiff's left leg and severely burned him. The distance between the incinerator and the rear of plaintiff's home was about 50 feet.

There is substantially no dispute as to the facts above stated and the only substantial conflict in the evidence is as to whether plaintiff went to the incinerator, pulled out some of the burning paper, a piece of which blew around his leg causing him to run back to his home, or whether the paper was blown from the incinerator and came in contact with plaintiff's leg while he was on the lot on which was the apartment where he lived.

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[illegible][illegible]

Plaintiff's position is that the evidence is to the effect that defendant on prior occasions had burned the same kind of paper in the incinerator, "and because of the draft caused by the heat from the combustion and because of the wind, the burning papers had been blown about the neighborhood"; that when plaintiff was last seen, a few minutes before the accident, he "was playing with his toys on his own lot in back of the building where he lived"; that "The difference between the plaintiff and the defendant apparently hinges upon one single question of fact, namely, was the plaintiff at the time of the accident on the premises of the defendant, or was he in his own back yard."

Defendant's position is that plaintiff went over to the incinerator, pulled out a piece of the burning paper, or that it came in contact with his leg, and that he was first seen about 6 or 8 feet from the incinerator running toward his home, with burning paper around one of his legs; that "There is no duty owed to a child of any age who is a trespasser on private property other than not to maliciously injure him. There is no contention in this complaint that the defendant set a trap, or otherwise maliciously injured the plaintiff, therefore the only questions in the case are whether or not the defendant was negligent, and whether such negligence, if any, made any difference in the instant case;" that there is not a scintilla of evidence "that the wind blew burning paper out of the receptacle, and caused it to come in contact with the child's clothing, *** It nowhere appears that the child was to the windward of the incinerator when the burning paper came in contact with his legs, *** that the theory of plaintiff is that the defendant was negligent in maintaining an unguarded fire where it must have known that burning embers might be carried from the fire to the plaintiff, and that defendant was negligent in failing to maintain any guard or protection around the fire to keep it from being blown by the

wind about the neighborhood"; that this theory "would be all right if it was shown that the boy *** was rightfully on the premises of defendant, or that the burning paper was blown from defendant's premises onto the premises occupied by the child's father, *** The law in this state is that a child trespasser is owed no greater or different duty than an adult. The only exception is in favor of children who are attracted upon the premises by something which is intrinsically alluring and which actually attracts them to the premises." And that counsel for plaintiff on the trial expressly stated, "I don't claim, your Honor, that that is an attractive nuisance."

Plaintiff called two witnesses who first saw plaintiff after the burning papers came in contact with his legs. These two boys were playing ball in the vacant premises immediately south of the vacant space behind defendant's store. They were Leonard Jacobsen, 15 years old, and his brother Willis, 21. Leonard testified that he heard the child scream, turned, and saw him about 15 feet from the fire running from the incinerator toward his home. His brother Willis gave testimony to the same effect except he said the child was from 6 to 8 feet from the incinerator.

The complaint charged that plaintiff was on his own premises when the burning papers came in contact with his legs. There is no allegation that would bring the case within the attractive nuisance doctrine and, as stated, counsel for plaintiff on the trial expressly repudiated any such contention and takes the same position in this court.

We think the evidence all shows plaintiff was on defendant's premises near the incinerator at the time the paper came in contact with his legs, and the court did not err in directing a verdict.

In this State the law, as we understand it, is that infants have no greater right to go upon another's property than adults except where the doctrine of attractive nuisance applies. McDermott

that about the same time; and this being found to be true
it is now shown that the boy was not actually on the premises of
defendant, or that the defendant was not then in possession of
premises upon the premises owned by the defendant's father, and the
law in this state is that a child's possession is not a ground of
liability only if it is a child. The only reason for this is
children who are entitled upon the premises of their father or
infringe upon the premises of others. The law is that a child
possesses. And that a child is entitled to the premises of his
father, "I have said, your Honor, that the law is that a child
possesses."

Plaintiff called two witnesses who testified that the
defendant's father was in contact with his father. The father
were playing ball in the street and the defendant's father
vacant house being defendant's father. They were playing Jacobson,
18 years old, and his brother Willie, 21. Defendant testified that
he heard the child answer, father, and saw him come in from
the line house from the defendant's house. His brother
Willie was testifying to the same effect and that the child
was from 8 to 10 years old and defendant.

The counsel for the defendant called two witnesses who
were the defendant's father and in contact with his father. There is no
evidence that Willie was in contact with the defendant's father.
Defendant and, as stated, counsel for plaintiff in the trial of
greatly exaggerated any such contention and that the defendant
in this court.

We think the evidence all of the plaintiff was not sufficient
to establish that the defendant was in contact with the defendant
with his father, and the court is not to be bound by the evidence.
In this state the law, as we understand it, is that a child

v. Burke, 236 Ill., 401; Matijevic v. Celese, 231 Ill. App. 498. But some authorities hold that a child seven years old is incapable of being a trespasser in the eyes of the law. Section 1049, 1 Thompson on Negligence, where the author cites Dublin Cotton Oil Co. v. Jarrard, 40 S. W. 531, affirmed 91 Tex. 289, 42 S. W. 959. What a fire such as the one in the instant case would be likely to attract plaintiff, see Specht v. Waterbury Co., 127 N.Y.S. 157; Union Pacific Ry. Co. v. McDonald, 152 U. S. 230; Ross et ux. v. Chester Traction Co., 73 Atl. (Pa.) 133; Piracelli v. Director General of Railroads et al., 112 Ill. (N.J.) 311; Carr v. Southern Pennsylvania Traction Co., 253 Pa. 271; Walt v. Biedronski, 278 Ill. App., 623, (abst.)

The case having been brought and tried on the theory that the doctrine of attractive nuisance was inapplicable, the judgment of the Superior court of Cook county is affirmed.

JUDGMENT AFFIRMED.

McSurely, P. J., concurs.

Matchett, J. dissents: I agree the evidence indicates the injured child was on defendant's premises when injured; but notwithstanding I think there was a question of fact for the jury. The burning of inflammable paper and refuse as disclosed by the evidence was inherently dangerous. The question of whose premises plaintiff (a child three years old) was on when injured is not material.

40379
40563

62A

BRENDA HOLTER,
Appellee,
vs.
FORREST WEBB HOLTER,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

299 I.A. 623⁵

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

April 13, 1938, plaintiff filed her verified complaint for a divorce charging her husband with adultery. The complaint contained the ordinary allegations as to the marriage, etc.; that there were two children; that defendant was earning about \$700 a month; that he threatened to dispose of his property, stocks and bonds and leave the State of Illinois. She prayed for a divorce, that he be enjoined from disposing of or encumbering his property and from interfering with her, and that a writ of ne exeat republica issue to prevent him from leaving the jurisdiction of the court.

April 20 following she filed her verified petition praying for temporary alimony and support for herself and the two minor children, and again for a writ of ne exeat republica. On the same day an order was entered which recites that defendant had been served with notice and appeared in court with his counsel; it was ordered that he be given five days to answer the petition and the matter was set for April 27; that he pay \$25 a week alimony and that he be enjoined from selling ^{his} stocks, bonds, etc. May 27 an order was entered on motion of plaintiff that a writ of ne exeat issue forthwith upon plaintiff filing a bond of \$200 without surety; the bond of defendant was fixed at \$1500 and the writ issued. Another order appears in the record entered May 27, in which it is recited that on motion of solicitor for plaintiff and after the writ of ne exeat had been served by the sheriff and defendant taken into custody, defendant appeared in open court under the

he custody of the sheriff; plaintiff and defendant were sworn and testified that he was unable to give bond for \$1500; it was ordered and decreed that he be kept in custody of the sheriff and delivered to the warden of the Cook county jail. June 22 there appears in the record the written appearance of defendant by his counsel. June 22 the case was heard before the court, witnesses sworn, and defendant was defaulted for want of answer. A decree was entered the next day; it recites that defendant had due notice of the pendency of the suit. Plaintiff was awarded a divorce, solicitor's fees and alimony and it was further decreed that the writ of ne exeat republica be continued in full force and effect.

July 15 following the entry of the decree defendant moved to vacate the order of default, the decree and all subsequent orders, and to dismiss the suit because it was vexatious in that a former suit was pending between the parties in the Circuit court of Cook county, brought by plaintiff against defendant for a divorce; and the motion further states that defendant had filed a cross-bill in that suit. Defendant did not file or offer to file an answer in the instant case. The motion was taken under advisement and on July 21 it was overruled. It is from this order that defendant prosecutes the appeal number 40563.

July 20 defendant moved to quash the writ of ne exeat republica and to dismiss the complaint; the next day the motion was overruled and defendant has appealed to this court, number 40379.

Defendant contends that the writ of ne exeat should not have issued and that his motion to quash should have been sustained. We think there is no merit in this contention. In the complaint, after stating the cause for divorce, it is alleged that defendant had threatened to dispose of all of his property and leave the State and that plaintiff believed he would carry out this intention. On the hearing of the divorce suit plaintiff testified, "He told me if

[illegible][illegible]

I went ahead with this action he would leave the State, take all of his personal property away and leave me without any support "whatever."

As stated, defendant filed no answer to the complaint nor to the petition for a writ (both of which were verified) and has not submitted any defense at any time either to the petition or to the complaint.

We think there is no merit in defendant's contention that his motion to dismiss the suit should have been sustained because another action was pending in the Circuit court. While the record in the appeal prosecuted by defendant from the dismissal of the Circuit court suit, as hereinafter mentioned, is not a part of the record in the two appeals before us, yet we have examined it and find that the complaint in that case was filed March 31, 1937, and charged defendant with habitual drunkenness. He did not answer that complaint until after the institution of the suit before us, viz., April 13, 1938, in which he was charged with adultery and drunkenness, and the adultery was alleged to have taken place April 12, 1938, more than a year after the Circuit court suit was filed; and apparently the reason no answer was filed to the suit in the Circuit court was, as stated by counsel for plaintiff, that there had been a reconciliation. It was not until about twelve days after plaintiff had filed her suit for divorce in the instant case that defendant filed his answer to the suit in the Circuit court. After filing his answer in that suit he filed a cross-bill in the Circuit court April 26, 1938, praying for a divorce. Two days thereafter counsel for plaintiff, pursuant to notice, moved the Circuit court to dismiss the divorce suit without prejudice. The matter was continued from time to time and the motion was allowed October 18. The order recites that defendant's answer and cross-bill in the Circuit court proceeding were filed without leave of court. Another appeal was prosecuted from that order to this court,

number 40579, which is still pending.

We also hold there is no merit in defendant's contention to the effect that although some of the orders mentioned show that defendant and his counsel were present, that after these orders were entered counsel filed what he designates a special appearance and therefor the court had no jurisdiction over him. Defendant was in court, represented by counsel, as the record discloses, and the fact that he had not at those times filed a written appearance is of no importance. Up to the present time there is no defense suggested in the trial court nor in this court. The two orders appealed from are affirmed.

ORDERS AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

TRUMAN W. WELLS,
Appellee,

vs.

EDWARD B. LINDBERG, individually
and doing business as Lindberg
and Stringham,

LINDBERG AND STRINGHAM, Inc., a
corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

63A
299 I.A. 624¹

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

June 20, 1936, Truman W. Wells brought an action against Edward B. Lindberg, individually and doing business as Lindberg and Stringham, to recover \$314.66 for services rendered. Lindberg filed an answer denying liability. There was a trial before the court without a jury and April 28, 1936, a finding and judgment was entered in plaintiff's favor against "Edward B. Lindberg, individually and doing business as Lindberg and Stringham." Following May 6 plaintiff took out an execution and the return of the bailiff shows he made a demand on defendant May 27, 1936, and on August 5, 1936, the writ was returned by the bailiff no property found and no part satisfied. About 15 months thereafter, viz., January 10, 1938, plaintiff brought garnishment proceedings on the judgment naming Lindberg & Stringham, Inc., corporation garnishee. Interrogatories were filed which were answered by the garnishee, the substance of which was that the garnishee had no funds or property in his possession belonging to the judgment debtor, Lindberg. The garnishment was tried before the court without a jury and there was a finding and judgment in plaintiff's favor against the garnishee for \$324.76, and the garnishee appeals.

Plaintiff's evidence is to the effect that he was employed

11

[illegible]

by defendant, Edward E. Lindberg, who was doing business as Lindberg & Stringham; that there was due and owing to him for services rendered \$314.63, for which amount he brought suit and obtained judgment; that he obtained an execution and while it was in the hands of the bailiff, Lindberg, Stringham and Peter M. Hengel formed the corporation and all the assets of Lindberg, Stringham and Hengel, who the garnishee claims were members of the copartnership, were sold and transferred by the three individuals to the corporation - Lindberg & Stringham, Inc., a corporation - as evidenced by a bill of sale dated June 26, 1936. It seems to be conceded that neither Lindberg, Stringham nor Hengel made any attempt to comply with the provisions of the Bulk Sales act when they transferred the assets to the garnishee corporation.

The garnishee's position on the trial and in this court, as stated by its counsel, is that when the original case was tried "Lindberg and Stringham were in effect a partnership, a copartnership and there is only one possible way of proceeding in this case and that is by way of the appointment of a receiver and the filing of a petition for the dissolution of the partnership to determine the individual interest of the copartners, subject to the copartnership liability ***

"We are prepared to prove that he was not doing business individually but that it was a copartnership and that copartnership transferred all of its assets to the corporation which was formed by Lindberg and Stringham."

On the other side plaintiff's position is that this question was adjudicated when the original case was heard, where suit was brought against Lindberg, individually, doing business as Lindberg & Stringham; that part of the judgment order found that plaintiff was entitled to judgment against defendant and that he recover "of and from the defendant Edward E. Lindberg, individually

[illegible]

and doing business as Lindberg & Stringham", \$314.66.

On the trial of the garnishment proceeding both parties put in evidence on the question whether Lindberg was doing business under the name of Lindberg & Stringham, or whether he was a member of the partnership of Lindberg & Stringham. The court found the issues against the garnishee and we are unable to say that the finding is against the manifest weight of the evidence. In these circumstances we are not warranted in disturbing the judgment.

The garnishee further contends that "plaintiff can proceed against the garnishee only where the defendant could have maintained a successful action against him." That is not the law when the provisions of the Bulk Sales act have not been complied with. Cohn v. Malo, 198 Ill. App., 538; Konski v. Smith, 224 Ill. App. 206; Larson v. Ritter, 327 Ill. App., 300; Grinding v. Billing, 243 Ill. App., 475.

In the Cohn case we held that where goods and chattels were sold by a debtor contrary to the provisions of the Bulk Sales act, the sale is void as against the creditors of the vendor and that they might be reached by garnishment. The Bulk Sales act provides that where goods and chattels are sold, such as in the instant case, notice must be given to the creditors of the party proposing to sell, and unless this is done the sale is void as to the vendor's creditors, and the creditors may pursue the goods or the proceeds thereof in the hands of the purchaser and maintain garnishment. No complaint is made as to the amount of the judgment rendered against the garnishee.

The judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

and from President Franklin D. Roosevelt, 1941-45.

On the first of the Government proceedings both parties

and in evidence on the Government's evidence, the Court said:

There is no doubt that the Government's evidence is correct and

correct of the evidence is of the Government's evidence, the Court said:

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40427

MINNIE MEYERS,
Appellee,

vs.

ALBERT J. MORAN, Bailiff of the
Municipal Court of Chicago, and
MICHIGAN OHIO BUILDING CORPORATION,
a Corporation,
Appellants.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

299 1A 634

M. JAMES O'BRIEN, CLERK OF THE COURT.

July 19, 1935, the Michigan Ohio Building Corporation obtained a judgment in the Municipal court of Chicago against Irving E. and Leontine Mossmann, husband and wife, for \$793.27; March 17, 1938, an alias execution was issued on this judgment and March 28 was delivered to Moran as bailiff of the Municipal court for service; March 30 the bailiff served the execution on Irving E. Mossmann and nearly a month thereafter, April 29, 1938, by direction of the Building Corporation levied the execution on a 1938 Oldsmobile which was then in the possession of Irving E. Mossmann. The next day Minnie Meyers brought the instant case, claiming the automobile belonged to her; there was a trial of right of property before the court without a jury and a finding and judgment in plaintiff's favor - that the bailiff turn over the automobile to her and that she recover her costs; defendants appeal.

The record discloses that Irving E. Mossmann purchased the automobile in question, a 1938 model, in October, 1937; it was delivered to him apparently under a conditional sales contract. Plaintiff, Mrs. Meyers, testified that she was a sister of defendant, Irving E. Mossmann; that she had advanced some money to him and March 20, 1938, gave him \$115 which was the balance he owed on the automobile, and he apparently got a clear title to the car at that time. The same day, March 20, 1938, defendant Irving E. Mossmann

executed a bill of sale of the automobile to his sister, Mrs. Meyers, for an express consideration of \$800 and it was acknowledged the same day by Mossmann before a notary public, but the automobile remained all the time in Mossmann's possession. April 4 Mossmann obtained a city license for the car in Mrs. Meyers' name and on the next day a state license from the Secretary of State, also in Mrs. Meyers' name. Mrs. Meyers testified: "I believe my brother attended to the purchase of the city vehicle tag and state license. The bill of sale was given to me on March 20th of this year. *** I received the Certificate for vehicle tax and State license at the same time. The State license tag was not issued until April 5, 1938, as that is when he went to settle this all up and gave it to me and I told him to go on and drive the car." Mrs. Meyers further testified that she had never driven the automobile; that she took the car as security for the money her brother owed her and the \$115 paid to the Finance company.

Counsel for defendants say that "An execution upon a judgment is a lien upon and binds the goods and chattels of the person against whom it is issued from the time it is delivered to the sheriff to be executed." We shall assume this is a correct statement of the law, but it will avail defendants nothing because the execution was delivered to the bailiff of the Municipal court on March 23, 1938; 3 days prior to that time, viz., March 20, plaintiff received the bill of sale, so that the title to the car passed 3 days before the execution was delivered to the bailiff.

But defendants further contend that under the law, "An absolute conveyance of personal property, where there is no delivery to the vendee and the possession of the property is permitted to remain in the vendor, is fraudulent as to creditors of the vendor." This statement of the law seems to be conceded by counsel for plaintiff but the argument is that the evidence does not show that plain-

[illegible]

tiff did not, in fact, take possession of the automobile. We think this is contrary to the evidence. All the evidence shows that from the time Irving E. Rosemann purchased the automobile in October, 1937, it was continuously in his possession and never in the possession of his sister, Mrs. Meyers; and this seems to have been the view of the trial Judge, who apparently based his decision on the fact that, since at the time of the execution of the bill of sale there was a balance due to the Finance company, it could have taken possession of the automobile, and that plaintiff, having paid the \$115 remaining due on that date to the Finance company or to her brother for that purpose, was in as good a position as the Finance company. In this we think the court erred.

In Ticknor v. McClelland, 84 Ill., 471, the court in passing on the question whether a sale of personal property where delivery had not been made was valid as against creditors, said (p. 474): "The policy of the law in this State will not permit the owner of personal property to sell it and still continue in the possession of it. Possession being one of the strongest evidences of title to personal property, if the real ownership is sufficient to be in one, the apparent ownership in another, the latter gains credit as owner, and is enabled to practice deceit upon mankind. It is the well established doctrine of this court, that an absolute sale of personal property, where the possession is permitted to remain with the vendor, is fraudulent per se, and void as to creditors and purchasers ****." And that where there is a sale of personal property "but it remains with the vendor, it is of that character of property that is capable of being removed, it is fraudulent in law as to creditors and subsequent purchasers, notwithstanding the sale may have been in good faith and for a valuable consideration."

So far as we have been able to find, the law as above stated has not been changed or modified in this State. See Muechle v. Morris, 131 Ill., 587; 24 L. R. A. (n.s.) p. 1134; Gass v. Pease,

79 Ill. App., 306; Pennywitt v. Lindsey, 188 Ill. App., 188; Jacobson v. Patterson, 190 Ill. App., 266; Smith v. Anemoeller, 204 Ill. App., 306; Williams v. Read, 219 Ill. App. 5; Katkins v. Dunbar, 232 Ill. App. 1; Grimes v. Rodgers, 233 Ill. App. 429; Doty v. O'Neill, 272 Ill. App., 212.

Since we hold that plaintiff never took possession of the automobile, the judgment of the Municipal court of Chicago is reversed and the cause remanded with directions to enter judgment in favor of defendants.

REVERSED AND REMANDED WITH DIRECTIONS.

McSurely, P. J., and Matchett, J., concur.

40446

OSCAR S. STEIN,
Appellant,

vs.

ILLINOIS PUBLISHING AND PRINTING
COMPANY, a Corporation,
Appellee.

APPEAL FROM SUPERIOR COURT

OF COOK COUNTY.

659 A 624³

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against defendant to recover damages for the breach of a contract entered into between the parties. July 1, 1933, defendant's motion to strike the second amended complaint was allowed and the complaint stricken without leave to amend except as to paragraphs 12, 13 and 14. July 30 following plaintiff sought to file his petition to vacate the order of July 1, but leave was denied. It is from these two orders that plaintiff appeals.

The record discloses that on September 2, 1937, plaintiff filed his verified complaint in law to recover damages for the claimed breach of a contract entered into between the parties. The complaint was in 11 paragraphs and the damages were laid at \$150,000. October 18 defendant filed its written motion to strike the complaint, specifying three grounds. The next that appears from the record is that on November 30, 1937, plaintiff served notice that on the following day he would ask that an order be entered extending to December 11 the time for filing an amended complaint, and on December 1 an order in accordance with the terms of the notice was entered on motion of plaintiff's solicitors; December 6 a verified amended complaint was filed which is in 12 paragraphs with exhibits attached; December 21 defendant filed its motion to strike the amended complaint on four specified grounds; April 30, 1938, an order was entered striking the amended complaint, "and the plaintiff is denied leave to amend except as to paragraphs numbers 10, 11 and 12, which deal

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with executed performances under the Contract sued upon, and as to said paragraphs plaintiff is hereby given leave to amend within five days," and the defendant was ruled to answer such amended paragraphs within five days. Following, there appears in the record a notice by plaintiff's counsel to counsel for defendant saying they would appear on May 6 before the trial Judge and "ask for leave to file the Second Amended Complaint in Law instantler," and for a rule on defendant to answer within 5 days. There appears in the record a second amended complaint filed May 6 but apparently there was no order entered permitting this to be done. The second amended complaint, which is verified, is in 14 paragraphs with a number of exhibits attached. Afterward, on June 2, a stipulation entered into between counsel is in the record in which it is stated the parties have stipulated and agreed that the time for defendant to plead or answer to the second amended complaint be extended to June 9. June 9 defendant filed its motion to strike the second amended complaint, specifying seven reasons therefor; July 1 following, an order was entered on motion of counsel for defendant striking plaintiff's second amended complaint, "and Plaintiff is denied leave to amend except as to paragraphs numbers 12, 13 and 14, which deal with executed performance under the alleged contract." Plaintiff was given leave to amend these paragraphs within five days if he elected to do so, and defendant was ruled to answer within 10 days thereafter.

The next that appears from the record is a notice served July 27 on counsel for defendant by plaintiff's counsel stating that on the following day they would ask leave to file an amendment to paragraphs 12, 13 and 14 instantler, and for rule on defendant to answer within 20 days, and that a further order be entered dismissing paragraph 13 of the second amended complaint because the claims made in that paragraph had been settled by the parties. The notice

further stated plaintiff would ask that a final order be entered dismissing paragraphs 3 to 11 inclusive, so that he could appeal to the Appellate court; July 23 plaintiff filed an amendment to paragraphs 12, 13 and 14. In paragraph 12 plaintiff claims \$560.40 for a number of sets of dishes, which amount he claims is due and unpaid. The amendment to paragraph 13 need not be referred to because it is admitted the claims made in that paragraph have been amicably adjusted. In paragraph 14 as amended plaintiff claimed \$1694 for obtaining a number of subscriptions to defendant's newspaper in accordance with the terms of the contract. July 28 the court entered an order giving leave to plaintiff to file an amendment to paragraphs 12, 13 and 14 instant, and further that paragraph 13 as amended be dismissed. It was further ordered, "that the defendant answer or move to strike the said Second Amended Complaint, as amended, within twenty (20) days from this date." The next day another notice was served by plaintiff's counsel that on July 30 they would present plaintiff's petition and ask for an order as prayed for in the petition. The petition is in the record, having been filed July 30. No order was entered giving leave to file it, but on the contrary an order was entered July 30 denying plaintiff leave to file the petition "on ground that same is not an emergency matter." The petition sets up in some detail what had been done in the case, the filing of the several documents and the orders entered and that the matter had been pending nearly a year without an issue having been reached; that unless a final order is entered dismissing the complaint "without prejudice to paragraphs 12 and 14, the plaintiff will be forestalled from taking an appeal on the matters alleged in paragraphs 3 to 11 of the Second Amended Complaint, which constitutes the major and most important issue to be decided in this cause;" that it will be a great hardship to plaintiff if he is obliged to await a trial on paragraphs 12 and 14 before being permitted to appeal

[illegible]

the major issue in dispute; that plaintiff is a resident of Florida and it would entail great expense if he were compelled to make more than one trip to Chicago; that the trial calendar was congested and that probably the trial "on paragraphs 12 and 14" would not be reached for a year and a half. The petition further set up that the order of July 1 should be vacated and in lieu thereof an order be entered dismissing the second amended complaint as amended "without prejudice to paragraphs 12 and 14," so that plaintiff may appeal to the Appellate court.

The first point made by counsel for defendant in their brief is that the appeal should be dismissed because the orders appealed from are not final. In the reply brief counsel for plaintiff say, "We are rather surprised at the defendant's contention in this court that the order appealed from is not final. In the lower court it was the contention of the defendant that the order of July 1st was final, and our contention that the order should be changed in form to make it final. Due to the objection of the defendant, the court refused to entertain the petition containing the form of final order which we proposed." But the final order proposed, as disclosed by plaintiff's petition, was that the order of July 1, 1938, be vacated and in lieu thereof an order entered dismissing the second amended complaint as amended "without prejudice to paragraphs 12 and 14." If the order were entered in accordance with the prayer of plaintiff's petition it would still leave pending in the trial court the matters set up by plaintiff in paragraphs 12 and 14 of the second amended complaint.

It has long been the settled law in this State that an appeal will not be heard piecemeal except under exceptional circumstances, and there are no such circumstances in this case.

We have examined the authorities cited by counsel for plaintiff on this point, one of which is Strey v. Buehl, 265 Ill.

App. 554, and think none of them is in point.

In the Strey case a bill was filed to enjoin defendants from declaring a forfeiture of a real estate contract and from prosecuting a forcible detainer suit. A temporary restraining order was entered which was subsequently, on motion of defendant, set aside and it was from this order that the appeal was prayed and allowed. The court said no point was raised as to whether the order was appealable, but that it appeared that the purpose of the bill was for a permanent injunction and that complainant's rights might be lost if a temporary injunction were not issued and to remain in force until final hearing. The court there said: "Owing to peculiar circumstances and hardships, the courts have refused to dismiss appeals from some judgments or decrees which did not completely dispose of the case in which they were entered," and the court continued and passed on the merits of the appeal.

We think there is involved in the instant case no peculiar circumstance or hardship that would bring it within the exception to the general rule mentioned in the Strey case.

The motion of defendant to dismiss the appeal is allowed and the appeal dismissed. McDonald v. Walsh, 367 Ill., 529.

APPEAL DISMISSED.

McSurely, P. J., and Latchett, J., concur.

April 22, 1931, and which was in the nature of a writ.

In the first case a bill was filed to obtain enforcement

from the court of a writ of habeas corpus and from

proceeding a writ of habeas corpus, a writ of habeas corpus

order was entered which was subsequently, on motion of respondent,

set aside and it was first time that the writ was granted

and allowed. The court said no point was raised as to whether the

order was reversible, and it is assumed that the writ was

still was for a permanent injunction and was reversible.

might be lost in a temporary injunction and not lost

remain in force until the writ is granted. The court said that

to obtain enforcement and enforcement, the writ was reversible

disputed because of some technical or technical error and some

slight difference of the writ which was reversible, and the

court said that it was not a writ of habeas corpus.

It was then in the case of the writ of habeas corpus

disputed as to whether the writ was reversible and the exception

to the general rule mentioned in the writ case.

The motion of respondent to dismiss the writ is allowed

and the writ is granted. Respondent v. Wilson, 257 Ill. 230.

THE COURT OF APPEALS IN THE SECOND DISTRICT

ANTON BARUSKI, Executor of the
Estate of WACKLOW MANKAVICK, Deceased,
Appellant,

vs.

STANLEY WARNIS and THERESA WARNIS,
Appellees.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

2991A-284

MR. PRESIDING JUSTICE McSORELY
DELIVERED THE OPINION OF THE COURT.

This is an action on a promissory note tried by the court,
who found for defendants and plaintiff appeals.

Judgment was entered by confession for \$544.50 on November
13, 1936, which was subsequent to the death of the payee, Wacklow
Mankavick, who died March 5, 1936. Subsequently, on motion of de-
fendants the judgment was vacated and they were allowed to defend.

Plaintiff introduced in evidence the note, dated February
15, 1934, payable to the order of Wacklow Mankavick in the sum of
\$400 and signed by defendants. The defense was that the note had
been paid in full to Mankavick.

To support the defense there was introduced a receipt pur-
porting to acknowledge receipt of the money and bearing a cross
which a witness for defendants testified he saw Mankavick place
upon the receipt after having received the money from defendants
in payment of the note.

There was convincing evidence that Wacklow Mankavick could
write his name. One witness testified that he could write his name
in Polish, English and Russian. Another witness testified that she
saw him sign his name "quite a few times. He always wrote it. He
wrote fluently." His will with his signature attached was introduced
in evidence. It is improbable that Wacklow Mankavick, payee in the
note, would sign the alleged receipt with a cross when he habitually
when executing papers signed his name. Also, three witnesses
testified that the defendant Theresa Warnis, sometime after the

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Office of the Dean of Students

Office of the Dean of Students

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decease of the payee, Macklow Hennavick, stated that the note remained unpaid.

The court rather abruptly, without permitting argument, found for defendants. When counsel for plaintiff asked the court how it could believe that a man who could write very "fluently" would make a cross, the court replied that he was familiar with the practices of the Lithuanian people and also he said the court "would not consider that so-called receipt worth the paper it was written on." If the court was of this opinion he should have entered judgment for the plaintiff, who produced the note uncanceled.

The judgment of the trial court is reversed and the cause is remanded with directions to reinstate the judgment entered by confession.

REVERSED AND REMANDED WITH DIRECTIONS.

Matchett and O'Connor, JJ., concur.

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LOUIS J. BOROWSKY,
Appellee,

vs.

LLOYD O. GILBERT,
Appellant.

APPEAL FROM MUNICIPAL COURT

67 2991A-625

MR. PRESIDING JUSTICE MCSURLEY
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit claiming that defendant was withholding from him one-half of the commission collected by defendant although there was an agreement between them that it should be divided by reason of their joint efforts in procuring a lease. The case was tried by the court without a jury and at the conclusion of plaintiff's case defendant introduced no testimony and the court gave judgment for plaintiff in the sum of \$2270.30. The question presented is almost wholly one of fact and there is virtually no dispute as to the transaction.

In January, 1935, plaintiff undertook to procure a lease for Christen Kaad; he knew that defendant was acquainted with Werner Wieboldt, owner of property which plaintiff desired to submit to Kaad; at plaintiff's request defendant met him in the office of Mr. Metherton, Kaad's attorney. There is virtually no denial that at this meeting it was agreed that defendant was to submit a proposal for a lease to Wieboldt, and if accepted the commission earned was to be divided equally between plaintiff and defendant. Metherton testified specifically that both parties stated the commission would be divided. Defendant, testifying as an adverse witness called by plaintiff, did not deny that this was the agreement.

In a letter from defendant to Wieboldt submitting the proposition to rent his property, plaintiff's name was mentioned as the party through whom the inquiry was made. Subsequently plaintiff wrote defendant confirming the conversation and saying that the proposition to rent Wieboldt's property was considered favorably

STATE OF NEW YORK

IN SENATE

JANUARY 1, 1911

REPORT OF THE

COMMISSIONER OF

THE STATE OF NEW YORK

IN RESPONSE TO A RESOLUTION PASSED BY THE SENATE

APRIL 1, 1910

ALBANY: THE STATE OF NEW YORK

PRINTED BY THE STATE OF NEW YORK

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by Rand. Another letter followed to the same effect. The negotiations for the lease to Rand were completed sometime later and defendant collected some \$4000 as commission from Wieboldt. No part of this was paid by defendant to plaintiff.

Subsequently Metherton inquired of defendant as to what he had done with reference to plaintiff's share of the commission, to which defendant replied, "Oh, to hell with Porowsky, what do I care about him?" To which Metherton replied that while the parties were in his office they "had agreed upon the commission and I think it is pretty small to clear a fellow out who originated the deal and brought you in, Gilbert. He's the fellow who told me to call you." To which defendant replied, "Well, that is my business, not yours."

At a later conversation Metherton inquired as to whether defendant had taken care of plaintiff, to which defendant replied in effect that he had his \$4000 and that was his business. Defendant had an opportunity to deny the foregoing conversations but did not do so. This evidence was amply sufficient to support the claim of plaintiff.

Defendant says that plaintiff failed to prove that he was a licensed real estate broker within the City of Chicago as required by the Municipal Code. Plaintiff introduced in evidence a license to engage in the business of real estate broker in Chicago, but apparently this was procured subsequent to the transactions above narrated. However, plaintiff properly says that proof that he was a licensed real estate broker was unnecessary in this case as it is not a suit brought against a client but against the defendant upon his agreement to pay plaintiff one-half of the commission earned. This was the situation presented in Simon v. Rollei, 243 Ill.App.629, where the court said that the question whether the plaintiff was a licensed real estate broker was immaterial, as the suit was not brought to recover a broker's commission but was based upon an

agreement made by the defendants to pay him a part of the commission received. In Gross v. Strauss, 203 Ill. App. 263, we held that the suit was based upon a promise made by the defendant to pay plaintiff one-half of the commissions received by the defendant, and hence plaintiff was not obliged to have a real estate broker's license. To the same effect are Jarnez v. Ramon, 243 Ill. App., 600, Gibons v. Williams, Monicer & Co., 191 Ill. App., 594, and Marcinkevich v. Wilson, 183 Ill. App., 147.

No substantial defense to the judgment is presented and it is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

FREMLEY L. NEVILLE,
Appellee,

vs.

R. B. SAWYER,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

This is a suit on a bond given in an appeal from a judgment rendered before a justice of the peace to the Circuit court of Cook county; on trial before the Circuit court judgment was rendered against defendant for \$527.15, from which he appeals.

Plaintiff obtained a judgment against Harry P. Pearsons and certain other defendants before a justice of the peace of Cook county; the defendants appealed to the Circuit court, having filed an appeal bond in the usual form; upon a trial de novo in the Circuit court judgment was entered against the defendants, who sued out a writ of error from this court; this court held that while plaintiff had a meritorious claim against defendant Pearsons, yet, because of a mistake in the form of the judgment entered by the Circuit court, it was reversed and the cause remanded for a new trial. Neville v. Pearsons, 283 Ill. App. 637.

After the filing of the mandate in the Circuit court the defendants other than Harry P. Pearsons were dismissed on motion of the plaintiff, leaving him as the only defendant. The surety on the original appeal from the judgment of the justice of the peace to the Circuit court became insolvent and defendant Pearsons was ordered to and did furnish a new appeal bond, with the present defendant, R. B. Sawyer, as surety. This was in the usual form, in which the surety undertook to pay any judgment rendered against Pearsons upon his appeal to the Circuit court. Upon the new trial in the Circuit court

judgment was entered against defendant Pearsons which has not been paid. The instant judgment was rendered in a suit on this new bond.

Defendant contends that when this court upon the prior appeal reversed the judgment and remanded the cause, this vacated the judgment entered by the justice of the peace and the appeal to the Circuit court. This is based upon the erroneous assumption that the writ of error, when the case was here before, was sued out to reverse the judgment rendered by the justice of the peace. Obviously this is not the case. The writ of error was sued out to obtain the reversal of the judgment in the Circuit court. The judgment which defendant now seeks to have reversed is the judgment upon the new appeal bond, given in connection with the appeal from the justice of the peace to the Circuit court and given after the Appellate court had reversed the Circuit court and remanded the case for a new trial and while the appeal from the justice of the peace judgment was still pending and undisposed of in the Circuit court. In other words, the reversal and remandment of the Circuit court judgment by this court merely remanded the case back to the Circuit court, leaving the appeal from the justice of the peace judgment to the Circuit court as it was before. It needs no citation of authority to demonstrate the correctness of this conclusion.

Plaintiff says that this appeal is prosecuted for the purpose of delay and that he is entitled to an additional amount of 10 per cent. as provided by the statute. Chap. 33, Sec. 23, Ill. Rev. Stats. 1937. We think this point is well taken. The judgment in the justice court was entered October 24, 1931. The judgment in the Circuit court is for \$527.15, and 10 per cent., or \$52.71, will be added to this judgment for vexatious delay. Roelling v. Wachening, 174 Ill. App. 321, 323.

The judgment is affirmed with penalty.

AFFIRMED WITH PENALTY.

Matchett and O'Connor, JJ., concur.

40466

JOHN CROFT,
Appellee,
vs.
R. B. SAWYER,
Appellant.

GA
APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

299 I.A. 625³

MR. PRESIDING JUSTICE MCSURELY
DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment of \$492.95 in an action on a surety bond.

The points made in this case and the facts are identical with the points and facts in Neville v. Sawyer, No. 40466, in which an opinion is this day filed.

For the reasons stated in that opinion the judgment of \$492.95 is affirmed with the added penalty for vexatious delay of 10 per cent, or \$49.29.

~~AFFIRMED~~ WITH PENALTY.

Matchett and O'Connor, JJ., concur.

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of 10 per cent. or less.

Attachment and Control, 1991

40467

JOHN W. DOBBINS,
Appellee,

vs.

R. B. SAWYER,
Appellant.

72A
APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

299 I.A. 625⁴

MR. PRESIDING JUSTICE MCSURELY
DELIVERED THE OPINION OF THE COURT.

Defendant in this case seeks the reversal of a judgment
of \$556.80 in an action on a surety bond.

The points made on this appeal and the facts are identical
with those appearing in Reville v. Sawyer, No. 40465, opinion
this day filed.

For the reasons stated in that opinion the judgment in this
case is affirmed with the added penalty of \$55.63 for vexatious
delay in prosecuting this appeal.

AFFIRMED WITH PENALTY.

Matchett and O'Connor, JJ., concur.

JOHN W. DUNN, JR.
Attorney
at Law
R. A. BAYLOR
Attorney

IN COURT REPORT

38974022

THE STATE OF TEXAS, COUNTY OF DALLAS, ss.
I, the undersigned, Clerk of the County of Dallas, Texas, do hereby certify that the within and foregoing is a true and correct copy of the original of the same as the same appears from the records of the County of Dallas, Texas.

Witness my hand and the seal of the County of Dallas, Texas, this 10th day of January, 1900.

JOHN W. DUNN, JR., Clerk of the County of Dallas, Texas.

The within and foregoing is a true and correct copy of the original of the same as the same appears from the records of the County of Dallas, Texas.

With these records in evidence, I, the undersigned, do hereby certify that the within and foregoing is a true and correct copy of the original of the same as the same appears from the records of the County of Dallas, Texas.

For the reasons stated in the opinion of the undersigned in this case is affirmed with the above and foregoing of the records.

JOHN W. DUNN, JR., Clerk of the County of Dallas, Texas.

Witness my hand and the seal of the County of Dallas, Texas, this 10th day of January, 1900.

JOHN W. DUNN, JR., Clerk of the County of Dallas, Texas.

40627

THE PEOPLE OF THE STATE
OF ILLINOIS,

Petitioner,

vs.

JAMES FARLEY,

Respondent.

71A
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

299 I.A. 625⁵

MR. PRESIDING JUSTICE McSORELY
DELIVERED THE OPINION OF THE COURT.

This is an appeal by The People from an order granting a new trial where defendant was found guilty of making^a malicious assault with intent to inflict bodily injury. Defendant filed no brief in this court.

Upon trial by the court defendant was found guilty and sentenced to the House of Correction for one year; subsequently, pursuant to notice, defendant filed a petition under section 72 of the Practice act alleging various errors of fact and asking that the judgment be vacated and he be granted a new trial; the State's Attorney was ruled to plead, answer or demur; The People filed a motion to dismiss defendant's petition, which motion was overruled and a new trial was ordered; on application to this court The People were given leave to appeal.

Defendant's petition to set aside the judgment of conviction and for a new trial alleges that he was not represented by counsel at the time of the trial and in consequence thereof was unable to present his defense to the charge made against him.

The record shows that defendant was brought before the court October 27, 1938, and on his motion the cause was continued to and set for trial November 10, 1938; November 10th the trial was continued to November 29th; the record shows that on this date defendant was in court with his counsel and was arraigned and pleaded not guilty; that defendant was advised by the court as to his right of trial by

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jury but elected to waive this and the cause was by agreement between the parties submitted to the court for trial without a jury; the cause was again postponed and set for trial December 8, 1938; the record shows that on this latter date defendant was present in court and represented by counsel and trial was had before the court without a jury, who after hearing all the testimony of the witnesses "and the arguments of counsel" found defendant guilty; the record further recites that upon the motion for final judgment on the finding of guilty the defendant was present and represented by counsel.

Defendant will not be heard to deny the record that he was represented by counsel. It is elementary that the statement of the record must be accepted as true. The People v. Noonan, 276 Ill. 430, 435.

The petition for a new trial does not state any facts which defendant could not present upon the trial. He asserts that he was acting in self-defense and could substantiate this "with credible witnesses if given an opportunity so to do." Defendant was at liberty from October 27, 1938, until December 8th - more than six weeks. He had ample time in which to prepare any defense he might have. The allegations in the motion were insufficient in this respect.

His petition for a new trial merely presents general allegations that he has been deprived of a defense to the charge made and is a law abiding citizen and is not guilty, and if these facts had been known to the court the court would not have entered judgment herein and would have given defendant sufficient time to employ counsel to present his defense. In view of the recitals in the record of the many continuances secured by defendant and that he was represented by counsel when the case was tried, these allegations in the motion for a new trial will not avail.

it has been repeatedly decided that the purpose of the writ of error coram nobis and the motion substituted for it in our practice is to bring before the court facts not appearing of record which, if known by the court at the time the judgment was rendered, would have prevented the court from entering judgment. The People v. Crooks, 326 Ill., 266; The People v. Rakielny, 279 Ill. App., 337; Jacobson v. Ashkinaze, 337 Ill., 141.

No facts were presented in defendant's motion which would justify the court in granting the motion for a new trial. The order of December 23, 1938, overruling the State's Attorney's motion to dismiss defendant's motion for a new trial is vacated and set aside and the order setting aside the judgment of the Municipal court and granting a new trial is reversed and the cause is remanded with directions to remand the defendant to the custody of the superintendent of the House of Correction to serve the remainder of his sentence.

REVERSED AND REMANDED WITH DIRECTIONS.

Matchett and O'Connor, JJ., concur.

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THE PEOPLE OF THE STATE OF
ILLINOIS,
Plaintiff,
vs.
LESLIE RHODES,
Defendant.

ERROR TO THE MUNICIPAL COURT
OF CHICAGO.

29911625⁶

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

An information was filed against Leslie Rhodes charging that he failed to make a return to the Department of Finance showing the gross amount of personal property he had sold during the month - that he had violated section 13 of the Retailers' Occupation Tax Act, par. 452, chap. 120, Ill. State Bar Stats. 1937. The case was tried, defendant found guilty and sentenced to jail for a term of 60 days. He sued out a writ of error from this court, challenging the sufficiency of the information in that it failed to allege that the Department of Finance maintained a branch office in Cook county, and that defendant's failure to report the tax was intentional and wilful. After the record was filed in this court the Attorney General asked leave and was permitted to file an amended information in which the two defects pointed out in the original complaint were cured.

Defendant contends that the court erred in permitting the amended information to be filed, and that it cannot be considered on this appeal; that the original information was wholly insufficient, as held by this court in People v. DeMet, 296 Ill. App., 215, where the information was similar.

The Attorney General contends that the amended information was properly filed by virtue of the provisions of section 13, Div. 7, chap. 38, Ill. Rev. Stats. 1937. That section provides: "The prisoner shall not in any case be discharged on account of

any insufficiency or informality in the complaint, or on account of any informality in the warrant, or because it is not under the seal of the judge or justice, but the warrant may be amended by the judge or justice of the peace at any time pending the proceedings."

We think it obvious that the provisions of this section are applicable only to procedure in the trial court and do not authorize amendments in the appellate court.

Section 92 of the Civil Practice Act has no application to criminal cases.

The original information being insufficient the judgment of the municipal court of Chicago is reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely, P. J., and Matchett, J., concur.

WEST SUBURBAN FINANCE AND THRIFT
COMPANY, a Corporation,
Appellant,

vs.

LATHROP BUILDING CORPORATION, a
Corporation, et al.,
Appellees.

APPEAL FROM JUDGMENT OF COURT

OF COOK COUNTY.

731
2992A. 626

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff filed its complaint in chancery seeking to re-
deem certain real estate from a foreclosure sale and to compel the
sheriff to receive \$6,000 tendered by plaintiff in full to effect
the redemption. Defendants filed a written motion to dismiss, the
motion was sustained, the cause dismissed for want of equity and
plaintiff appeals.

The record discloses that in November, 1927, Charles Frey
and wife owned the real estate in question, which was subject to a
\$60,000 first mortgage bond issue. It was also subject to a second
and third mortgage owned by plaintiff, the West Suburban Finance and
Thrift Company, which filed suit in June, 1931, to foreclose its two
mortgages. In August, 1932, the Chicago Title & Trust Company,
trustee in the trust deed given to secure the payment of the \$60,000
bond issue, at the request of a bondholders' protective committee,
filed its suit to foreclose. Plaintiff was made a defendant. In
October, 1932, plaintiff, under a decree entered in its suit fore-
closing the second and third mortgages, purchased the property, as a
result of which a deficiency decree for \$17,726 was entered October
19, 1932, against Charles Frey and wife. Plaintiff filed its answer
to the foreclosure of the \$60,000 bond issue and made proof of the
amount due it under the deficiency decree.

The foreclosure decree provided that if the defendants or
some of them did not pay the amount remaining due on the bond issue

with costs, etc., that the property be sold and the proceeds applied toward the satisfaction of such indebtedness, and that if there was a surplus the master bring such surplus into court. And obviously if there was a surplus it would have been paid to the Finance company on its deficiency decree.

In August, 1934, plaintiff received a master's deed as a result of its purchase of the property in its foreclosure suit. Three months thereafter it conveyed its interest in the property ^{deed} by quit claim to Sidney Metzl and wife, as joint tenants, for \$750. Metzl was at the time chairman of the bondholders' protective committee and the largest individual bondholder in the \$6,000 issue; the conveyance was made to Metzl and his wife as nominees of the bondholders' committee. The conveyance was approved by a resolution of the board of directors and stockholders of the plaintiff corporation. About five months thereafter, in April, 1935, a decree was entered in the bond issue foreclosure suit which provided that any bondholder or group of bondholders might purchase at the master's sale and use bonds in lieu of cash. September 23, 1935, the master sold the premises for \$6,000 to George A. Menner, a member of the bondholders' protective committee, who was one of the larger bondholders. He bought as a nominee of the bondholders' committee and the purchase was made pursuant to a plan of reorganization, a copy of which was attached to the master's report of sale.

The master, in his report of sale and distribution, reports that he received \$3511.47 in cash, most of which was applied on the costs and expenses of suit, and that for the balance of the sale price of \$6,000, viz., \$2488.53, he accepted bonds and coupons in accordance with the provisions of the foreclosure decree.

The plan stated that \$52,500 of the bonds were outstanding, that more than 86% of them had been deposited under the protective

of transportation, a way of which the demand is the essential

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agreement, and the plan contemplated the property be bid in at the lowest price at which it could be purchased to protect the interests of the depositing bondholders; that if at the sale any bid was made which in the opinion of the committee was more favorable to the depositing bondholders than having the property purchased by the committee, it would not have its nominee buy the property; that if the committee was the successful bidder the plan of reorganization would be submitted for consideration and approval to the judge of the court hearing the foreclosure case; that if the committee's nominee should be the successful bidder it would cause its nominee then holding title to redeem from the sale. After the sale was made by the master to Kemmer, other bondholders, in reliance upon the plan of reorganization, deposited their bonds, raising the total of deposited bonds to 95.

In February, 1936, the master's sale was approved by the court and an amended plan of reorganization presented to the chancellor, which was substantially the same as the original plan except that it recited the purchase of the property by Kemmer as nominee for the committee, and provided for the formation of a corporation to hold title instead of a liquidation trust. The amended plan recited that the committee would require its nominee then holding title to the property to redeem from the master's sale, then convey the property to a corporation to be organized as the "Latrobe Building Corporation." The amended plan was approved by the court, who found that notice had been given to all the bondholders that the plan would be submitted to the court for its approval at the time and place stated. The decree approved the master's sale, and the amended plan also recited that the court had examined the original and amended plan and after hearing found that the amended plan was fair and equitable, and it was decreed that the exchange of old securities for securities under the new plan be approved and that

copies of the amended plan be mailed to all depositing and non-depositing bondholders within 10 days. The decree approving the master's report of sale and reorganization finds that all parties were notified, and the record discloses that the attorney for plaintiff, the West Suburban Finance and Thrift Company, a defendant in the bond issue foreclosure suit, was served with notice of all steps taken in the matter, and that no objection was made by the West Suburban company to the amended plan for reorganization, or to anything that was done in the matter.

Afterward, pursuant to the amended plan of reorganization, the committee organized the Latrobe Building Corporation, to which Sidney Metzl and wife conveyed the premises in July, 1936. August 16, 1936, Renner who as no. 100 of the committee had purchased the premises at the foreclosure sale, endorsed his certificate of sale which he had received from the master, in which he recited that the Latrobe Building Corporation had paid in full the amount for which the property was sold to him by the master, and the property had been redeemed from sale.

More than a month thereafter, September 23, 1936, upon notice to counsel for the West Suburban Company, Metzl and Renner presented their verified petition to the court in which they set up the formation of the Latrobe Building Corporation pursuant to the amended plan; that they were president and secretary respectively of the bondholders' protective committee which had presented the amended plan; that the provisions of the plan had been consummated; that the equity of redemption in the property had been conveyed to the Building corporation by the members of the bondholders' protective committee who held title; that there had been a redemption from the sale; that the plan had been approved; that the reorganization loan had been made, out of which all foreclosure and other costs and expenses and part of the taxes would be paid; that the

balance of the taxes were contemplated to be paid out of the funds in the hands of the receiver in the foreclosure suit; that the Building corporation held title, etc.; and on the same day an order was entered finding the facts substantially as set forth in the petition, and that the Building corporation had redeemed from the master's sale and was the owner of the premises in fee simple subject to the trust deed on the property which had been executed to secure a reorganization loan of \$6000; and the court also found that what had been done was all in accordance with the amended plan of reorganization, and the receiver was ordered to surrender possession of the premises to the Building corporation.

The record further discloses that afterward the holders of \$50,000 of bonds exchanged them for stock in the Building corporation in accordance with the reorganization plan, and that October 10, 1936, the Building corporation paid \$3789.02 unpaid ^{back} taxes; that in order to make payment of the reorganization costs and expenses and accrued taxes the Building corporation had borrowed \$5,000 secured by a trust deed recorded September 9, 1935, to Victor Langsett, trustee, and that the trustee and Lyrtila Langsett owned the \$5,000 note and trust deed.

December 18, 1936, which was more than four months after Renner had delivered his certificate of redemption acknowledging receipt of \$6,000, as above stated, plaintiff, the West Suburban company, tendered \$6,000 with interest, etc., to the sheriff of Cook county to redeem the property from the master's sale, plaintiff claiming it was entitled to do so by virtue of its deficiency decree of more than \$17,000 above referred to, contending that the attempted redemption from the sale by Renner was ineffective and void.

Plaintiff contends that the steps taken by the bondholders' committee in attempting to redeem from the master's sale "amounted merely to the certificate holder executing and placing of record a

certificate of redemption, without payment of the amount of the sale;" that what was done "did not constitute a redemption in law and that the redemption process lacked the essentials of a redemption in fact; that the committee could not redeem from itself and that payment of the sale price is ^{an} essential element of a statutory redemption;" that "Redemption under the statute is a cash and carry transaction;" that "Not a dime was paid to the master in ordinary banking the sale;" that "All that is required to make a redemption is payment; and the only thing that can be a redemption under Section 18 is payment" (Sec. 18, chap. 77, Ill. State Bar State. 1937); that "The record shows there was no idea or thought that there was any money to be paid for a redemption. It was all a paper transaction and according to plan;" that "the simplicity of the statutory provision on the redemptions is striking. All that is required of the redemptioner is to pay the debt with interest." and that the record shows that all the expenses and all payments made were from the proceeds of the \$8,000 mortgage placed upon the property by the building corporation. We agree with this latter contention. The record shows that all the moneys that went to pay expenses, taxes, etc., were obtained from the \$8,000 loan. But we are unable to agree with the statement that the method of redemption is strikingly simple; But are in accord with the statement that "the bar is said to regard statutory schemes of redemption from judicial sales as a baffling complex of pitfalls." 6 University of Chicago Review, page 525. We are also of opinion that redemption from a master's sale pursuant to a foreclosure decree does not always require the use of money. and it seems to be conceded that even though the certificate of sale and the equity of redemption became vested in the same person, there is no merger and the certificate of sale is not thereby destroyed and the right of redemption continues. McQuar v. Goldstein, 306 Ill. 129.

Counsel for defendants in their brief say that "by their

matters to disclose they admit that George Renner received no money or its equivalent from Intero Building Corporation." But they say that Renner was the nominee of the committee and held the certificate of sale for the benefit of the depositing bondholders; that the Intero corporation "was organized by the committee for the benefit of the bondholders as part of the plan of reorganization;" that if any money had been actually paid to Renner, "it would have been the bondholders' money, both before and after the payment. Inasmuch as the bondholders surrendered their rights for stock of the corporation the corporation could have been entitled to receive back the redemption money paid. The situation was not different in substance than if George Renner had sold the equity of redemption as well as the certificate of sale in his own right and had, under such circumstances, made out and recorded a certificate of redemption, thereby showing an intention to redeem and giving notice to all persons interested of such intent;" and that in these circumstances the redemption would have been good under the rule stated in the Hoggar case.

As a result of what was done in the foreclosure, redemption and reorganization plan, the depositing bondholders now have stock in the building corporation in lieu of their bonds, and the non-depositing bondholders have received their proportionate part of what was derived from the proceeds of the foreclosure sale, and so far as the record discloses, no bondholder is complaining that the plan followed was not the best one under the circumstances.

Section 12 of chapter 77, Ill. Rev. Stats. 1937, provides that, "Any mortgagee, or any person within twelve months from said sale, redeem the real estate so sold by paying to the purchaser the sum of money for which the premises were sold or bid off." Under this provision the purchaser is entitled to his money but obviously he can do as he pleases with the certificate - give it

any or more could be offered for it - and now the proper certificate is filed by showing the redemption has been made, we think this is sufficient unless that was done was fraudulent.

In the instant case plaintiff was in no way prejudiced. It was advised if the foreclosure suit and the various steps taken that there was to be a reorganization in which the depositing bondholders would surrender their bonds for stock in the corporation, and the method by which this was to be accomplished was pointed out in detail. Defendant filed an answer to the foreclosure suit, proved up its deficiency decree, was advised of the reorganization plan, and made no objection at any time, but on the contrary, after it had obtained a deed under its foreclosure of the second and third mortgages on the property, sold and quit claimed all of its interest in the property for \$75. to a member of the committee of bondholders, and throughout the proceedings made no objection. Afterward defendant and wife lent the said corporation \$5,000 for which they now hold its trust deed and note. Under these circumstances we think plaintiff is not in a position to complain. It is stopped by its own conduct. Chicago Title & Trust Co. v. Friedman, 203 Ill. 646.

The order or decree of the circuit court of Cook county is affirmed.

AFFIRMED.

McBurey, C. J., and Hatchett, J., concur.

**P. N. Chiasson, Plaintiff-Appellee, v. National Triangle
Securities, Inc., Defendant-Appellant.**

Appeal from Circuit Court of Pike County.

OCTOBER TERM, A. D. 1938

Gen. No. 9158

Agenda No. 25

MR. PRESIDING JUSTICE RIESS delivered the opinion of the Court.

This suit was originally brought by plaintiff-appellee, P. N. Chiasson, a physician, hereinafter referred to as plaintiff, against National Triangle Securities, Inc., defendant-appellant, hereinafter designated as the defendant company, before a Justice of the Peace of Pike County, Illinois, seeking recovery of \$500 damages, on account of a claim for medical services alleged to have been rendered to Oliver Collins, an employee of said defendant company.

The suit was afterward tried de novo on appeal to the Circuit Court of Pike County, without a jury, and a judgment was rendered in favor of plaintiff Chiasson for the amount of \$443, from which this appeal followed.

Defendant company owned and operated an orchard in Pike County, and employed one Thomas Smith, who was in the fruit commission business and an experienced apple dealer, for the purpose of generally advising with said company in regard to the management of its orchards. Smith went to the orchard weekly during the summer and fall months when spraying, picking and packing apples was in progress. The President and Secretary of defendant company made frequent trips to the orchard for the purpose of exercising direct control over it.

In addition to the help of Smith, it became necessary for defendant to have one experienced in orchard work and handling of men to personally direct and carry out its orders relative to spraying, picking and packing apples, and for that purpose one James Bright, of Griggsville, was employed under an oral contract. Bright personally hired and discharged men who worked in the orchard and kept record of their time of employment. Checks for wages were signed by de-

defendant company in Chicago and sent to Bright, who delivered them to the employees. Defendant also gave Bright a cash fund to be used for small emergency expenses such as repairs, equipment, gas, oil, postage and other incidentals. The expenditures by Bright out of this cash fund were reported regularly and submitted to the defendant-appellant by Bright for approval.

On October 12, 1934, defendant was operating a truck in its orchard which gathered up the workmen who were employed therein, took them to the orchard during the day and at night returned them to Griggsville. On that evening, two employees of the defendant company, Oliver Collins and Roy Vaughn, were injured in an accident in which the above truck was involved. Upon being notified by telephone, Bright went to the home of Vaughn. Dr. Chiasson, the plaintiff, had previously been notified and had gone to the scene of the accident. Dr. Dilts rendered first aid treatment to Collins at his home and recommended that he be taken to the hospital.

Dr. Chiasson testified that he was employed by James Bright, as agent of the defendant company, to attend Collins after the injury and take him along to the hospital to which he was taking Vaughn and continue treating him until the defendant had discharged him from the case. Collins was taken with Vaughn to a Quincy hospital and there treated by other physicians. Six months later, at his home or in the office of Dr. Chiasson at Griggsville, the latter resumed treatment of Collins.

The defendant company denies that James Bright employed Dr. Chiasson to treat Collins on the night of the accident, or at any other time, and denies that Bright had any authority to make a contract in relation thereto which would bind the defendant company.

Appellant company was operating under and was bound by the provisions of the Workmen's Compensation Act of the State of Illinois. Subsequent to his injury, Collins filed his claim for Workmen's compensation against the defendant company. In this proceeding, the Industrial Commission awarded Collins the sum of \$20.00 for medical services rendered Collins by plaintiff Chiasson, which amount was paid by a check made payable to and endorsed by Collins and Chiasson. Seventy-five dollars was also allowed and paid to the hospital for another treating physician and surgeon, Dr. Jurgens, whose claim is not involved herein. Dr. Dilts was also paid for his first aid treatment.



Defendant company contends that the claim of Dr. Chiasson for medical services was submitted to the Industrial Commission by Collins; that the award of \$20.00 was made to Collins for Dr. Chiasson, which was later accepted by him and that the plaintiff is therefore estopped from proceeding to collect his alleged claim from the appellant company by virtue of his alleged contract of employment to treat Collins. The plaintiff was not a party to the proceedings before the Industrial Commission. The Workmen's Compensation Act deals exclusively with matters growing out of the relation of an employer and an employee. All except employer and employees are strangers and not bound by the Act, and their usual lawful rights and remedies are unaffected by it. *Augustus v. Lewin*, 224 Ill. App. 376; *Hoyt v. London Guar. & Acc. Co., Ltd.*, 227 Ill. App. 92. Appellee Chiasson was not bound by the award of the Industrial Commission. His alleged claim did not arise under the Act. His suit is based upon an alleged contract. The Workmen's Compensation Act does not provide that physicians may voluntarily come under its provisions, but a physician's right to recover from the employer for services rendered an injured employee must be based upon a contract between the employer and such physician who is not under the Act to pay for the services. *Augustus v. Lewin*, *supra*.

The defendant company contended that the plaintiff, Dr. Chiasson, failed to prove by competent legal evidence that Bright was acting as an agent within the scope of his authority when the alleged contract was made or that the same was entered into or ratified by the company. The authority of an agent to act in such a manner as to bind his principal will not be presumed. A third person is not justified in assuming that an agent has certain powers, unless he bases his opinion on some material evidence of such authority, and a party dealing with a special agent or an agent only having special authority to act for his principal, must acquaint himself with the extent of the agent's authority. *Murray v. Standard Pecan Co.*, 309 Ill. 226, 140 N. E. 834; *Cabiness v. Texas Tie and Lumber Preserving Co.*, 152 Ill. App. 406.

James Bright was acting in the capacity of a foreman or special agent with limited powers. He personally hired and discharged men; he kept the time of the men who worked in the orchard; he received their checks for wages signed by the appellant and delivered



them to the employees. He had at his disposal a cash fund of about \$100 to be used for small emergency expenses, such as repairs, equipment, gas, oil and similar incidentals, and he reported expenditures from this fund regularly to the defendant company. Bright was in no way held out by the company as having authority to engage the services of Dr. Chiasson or that he in fact did employ him, and Bright testified that he first learned in June, 1936, that Dr. Chiasson was claiming that the company owed him for medical services rendered to Collins.

Edwin L. Brown, Secretary and Treasurer of the company, denied that Bright had been given any authority to incur any obligations or to issue checks or pay bills on behalf of the company. It is elementary that the authority of the agent cannot be established by declarations of the alleged or supposed agent and what he did. *Patton v. Young*, 233 Ill. App. 515; *Merchants' Nat. Bank v. Nichols and Shepard Co.*, 223 Ill. 41, 79 N. E. 38.

The authority of an agent, when the agent is directly involved, can be established only by tracing authority to its source by words or acts of the principal and cannot be found to exist solely in the acts or statements of the agent himself. *King v. Chicago B. and Q. R. Co.*, 235 Ill. App. 401.

We hold that it is not shown by the evidence that the foreman Bright had any authority to bind the defendant company to pay for the medical care and treatment of Collins. The value of the emergency treatment so rendered by the plaintiff, if any, is not shown by the evidence. The treatments extended over a period of almost eighteen months subsequent to the injury. The plaintiff had ample time to communicate with authorized agents of the appellant, and under the circumstances, was not justified in assuming that local foreman Bright had any certain powers, and it was clearly his duty to acquaint himself with the extent of the local agent's authority, if any.

The judgment of the Circuit Court is therefore reversed and the cause is remanded.

Reversed and Remanded.



PUBLISHED IN ABSTRACT

Mrs. Florence Engelking, Appellee, v. Springfield
Brewing Co., an Illinois Corporation, Appellant.

Appeal from Circuit Court Sangamon County

OCTOBER TERM, A. D. 1938

Gen. No. 9150

Agenda No. 20

Mr. Justice Fulton delivered the opinion of the Court.

Mrs. Florence Engelking, the Appellee, instituted this suit against the Springfield Brewing Co., a corporation, to recover on a promissory note dated December 7, 1935, in the principal amount of \$1,000.00 signed by "Springfield Brewing Company, by C. Engelking, President." Mr. Engelking is the husband of the Appellee. A copy of the note was attached to the complaint and was payable on demand to the order of the Appellee.

The Appellant corporation filed an answer setting up four defenses. First, a denial of the execution of the note or that it had not been paid, or that the Appellee was the owner and holder thereof; second, want of consideration; third, that C. H. Engelking was without authority to execute the alleged note in behalf of the Appellant; and fourth, that the books of the company showed that C. H. Engelking personally advanced the sum of \$1,000.00, and charged on the books that the loan came from him and that subsequently the Appellant corporation had entered into an agreement with the said C. H. Engelking for the satisfaction of such loan. The answer of the Appellant corporation was verified, and no reply was filed by Appellee to said answer.

The case was tried before the Court without a jury and the Circuit Court entered judgment for the Appellee in the sum of \$1,125.00, being the principal amount of the note plus stipulated Attorney's fees.

The facts in the case show quite clearly that C. H. Engelking, the husband of the Appellee, was President and General Manager of the Appellant Corporation; that on December 7, 1935, the said corporation needed money to meet its payroll. On the same date, the said Engelking obtained \$1,000.00 from his wife, the Ap-



pellee, which said sum was used by the Appellant corporation to meet its payroll and pay other bills. These facts were testified to by C. H. Engelking and also by the then auditor of the corporation, Joseph S. Meyer, who further testified that the \$1,000.00 was advanced to the corporation and paid out for the purposes above specified and that the money had never been repaid; that he made out the note upon which the suit is based payable to the Appellee but did not remember exactly the date he actually drew the instrument except that it was sometime after December, 1935.

While it was stipulated that on March 11, 1937, the said C. H. Engelking made a statement under oath for the purposes of re-organization of the Appellant, to which was attached a full and complete list of the outstanding liabilities of the Springfield Brewing Company and contained the following items: "1-1-37-C. H. Engelking-\$1000.00", and that interest was paid to C. H. Engelking on the note in question, still we are convinced that the preponderance of the evidence shows that the money was furnished by the Appellee; that the note was executed and made payable to her and that she has never been repaid.

It is the contention of the Appellant that the loan was made by C. H. Engelking, the husband of the Appellee; that the same was carried on the books of the Company as an obligation due and owing to the said husband; that at the end of one year the Appellant corporation paid the interest on the loan to the said husband; that at the time of the re-organization of the Appellant corporation, in March, 1937, the husband executed a sworn statement as to the liabilities of the corporation, in which statement there appeared a loan due to the said C. H. Engelking, and no note or obligation payable to his wife, the Appellee; that on or about the same time, he agreed to satisfy said obligation by taking certain stock in Appellant corporation. On the questions of fact, we think the evidence clearly preponderates in favor of the Appellee because of the execution of the note, payable to Appellee, and the supporting testimony by her husband and the auditor of the company.

The Appellant further contends that because no reply was filed to the answer the defenses of want of consideration, lack of authority of the husband of the Appellee, as a corporation officer, to execute the note, and the satisfaction of the debt between the hus-

band and Appellant corporation must be deemed to be admitted. Under the Civil Practice Act of Illinois, Ill. R. S. 1937, Chap. 110, Sec. 164, it is provided:

"(2) Every allegation, except allegations of damages, not explicitly denied shall be deemed to be admitted, unless the party shall state in his pleading that he has no knowledge thereof sufficient to form a belief, and shall attach an affidavit of the truth of such statement of want of knowledge, or unless the party has had no opportunity to deny."

Under the old Chancery Act it was held that when no replication was filed and the cause was tried upon Bill and Answer, an affirmative defense set up in the answer must be taken as true where no testimony was taken on that issue. *Watt v. Cecil*, 368 Ill. page 510. In *Ogent v. Beasley*, 284 Ill. App. 363, where the Plaintiff was ordered to file replication to the answer and he failed to do so and went to trial on Bill and Answer the same rule was announced. It is a familiar rule that pleadings shall be liberally construed with a view to doing substantial justice between the parties. In the present case testimony was taken on the issues raised by the affirmative defenses in the answer, both by way of stipulation as well as by oral and documentary proof. We believe, therefore, that the strict rule of admitting the subject matter of the affirmative defenses in the answer should not be applied in this case. The Court heard all of the testimony on all of the issues raised and in our judgment was warranted in finding the issues for the Appellee. The judgment of the Circuit Court is therefore affirmed.

Affirmed.





76A

**Selma Adair, Administratrix of the Estate of James
Adair, deceased, Plaintiff-Appellee, v. The Alton
Railroad Company, a corporation,
Defendant-Appellant.**

Appeal from Circuit Court of Sangamon County.

OCTOBER TERM, A. D. 1938

2991A-5264

Gen. No. 9160

Agenda No. 26

MR. JUSTICE FULTON delivered the opinion of the Court.

Selma Adair, Administratrix of the Estate of James Adair, deceased, the Appellee, brought a suit in the Circuit Court of Sangamon County against the Alton Railroad Company, Appellant, to recover damages under the Injuries Act, for the death of James Adair, who was killed on November 10, 1936, while attempting to drive an automobile truck across the tracks of Appellant where they intersect North Grand Avenue, in Springfield, Illinois. The case was tried before a Court and Jury and a verdict rendered in favor of Appellee in the sum of \$10,000.00. After overruling motions for judgments notwithstanding the verdict and for a new trial, the Court caused judgment to be entered on the verdict, resulting in this appeal.

The complaint consisted of one Count charging the Appellant Railroad with negligence in the operation of one of its trains and in the failure to keep or maintain warning signs and signals at the crossing where the accident occurred.

There is some conflict in the evidence on the question of whether a whistle was blown or a bell sounded in compliance with the Statute, on the speed of the train, on the weather conditions at the time of the collision and over the conditions surrounding the crossing, but in our view of the case it is not necessary to discuss the negligence claimed and charged against the Appellant. The primary question is whether there is any proof in the record showing that the deceased was in the exercise of due care for his own safety.

On November 10, 1936, at about 4:15 A. M., while it was still dark, the decedent, James Adair, drove his truck in an easterly direction on North Grand Avenue



to the point where the tracks of Appellant intersect said Street. North Grand Avenue is a cement paved street designated as temporary U. S. Route 66, and runs east and west through a well built up part of the City of Springfield. The double tracks of the Appellant's railroad cross the Avenue in a northeasterly and southwesterly direction at a point approximately 100 feet east of the center of Sixth Street. Sixth Street runs north and south and crosses North Grand Avenue at right angles. The width of the pavement on the Avenue is forty feet from curb to curb and the total width of the street from property line to property line is eighty feet. A street light was on the north side of the Avenue twenty-feet west of the Southbound railroad track which is the west track. There is a fire engine house fifty-five feet west of the railroad tracks. The track nearest the engine house is the one on which the Appellant's train approached. The front of the fire house stands about twelve feet north of the north curb of the Avenue. It was 35 feet wide, 75 feet long and thirty feet high. The east wall of the fire house is at right angles to the Avenue and not parallel to the tracks. The testimony of a witness for the Appellee, Melvin Wing, established the fact that from a point sixty feet from the westernmost railroad rail, a truck driver going east on the Avenue, could plainly see evidences of the railroad such as a tower house, gates and signs. He also testified that such driver would have to be about sixty or seventy feet west from the Southbound track before he would get a clear view down the railroad for two hundred to three hundred feet and that as you go farther east on the avenue your view broadens down the railroad to the North-east. His testimony is corroborated by two photographs, both taken in the center of North Grand Avenue, one at a distance of fifty-two feet west of the west rail of the south bound track and the other at a distance of forty-two feet west of the same rail. In the last photograph the only possible obstruction to the view would be a row of telephone poles one hundred and ten feet apart running along the west side of the right of way and a small "No trespassing sign" located on the right of way between the two poles nearest the Avenue. * * *

Into this situation the deceased drove his truck east on the south side of North Grand Avenue, travelling at the rate of eight miles per hour. Just east of the intersection of Sixth Street and North Grand Avenue

he shifted gears and drove ahead to the tracks. Just as he reached the track, he turned his truck to the south and it was struck or "side-swiped" by an engine of Appellant pulling a train travelling south on the south bound track. The truck was thrown some twenty feet to the south and up against the tower house of Appellant located south of the Avenue and west of the tracks. The gas tank on the truck exploded, caught fire and the deceased, James Adair, was dead when he was taken from the wreckage. It seems clear to us from the manifest weight of the evidence that the Appellee has failed to prove that the deceased was in the exercise of due care and caution for his own safety at the time of the accident. The burden of proof is always on the Plaintiff in actions of this character to show that the deceased was in the exercise of due care at the time he was injured. *Stack v. East St. Louis Ry. Co.*, 245 Ill. 308. Proof by the Appellee in this case that the deceased was in the exercise of ordinary care for his own safety was essential. *Greenstreet v. A. T. & S. F. Ry. Co.*, 234 Ill. App. 339.

Testimony of Appellee's witness Wing above set forth, coupled with the photographs mentioned, show quite clearly that deceased after passing the engine house had an almost unobstructed view down the track for two hundred or three hundred feet and that after reaching a point at least forty feet west of the tracks he had a clear view down the railroad tracks. Although there is some testimony concerning a fog there is no evidence that a train with an electric headlight could not be seen at a distance. In *Greenwald v. Baltimore & Ohio R. R. Co.*, 332 Ill. 627, it is stated:

"It is generally recognized that railroad crossings are dangerous places and one crossing the same must approach the track with the amount of care commensurate with the known danger, and when a traveler on a public highway fails to use ordinary precaution while driving over a railroad crossing, the general knowledge and experience of mankind condemns such conduct as negligence."

This language is adopted and approved in the cases of *Sowers v. I. C. R. R. Co.*, 261 Ill. App. 63, and *Provenzano v. I. C. R. R. Co.*, 357 Ill. 192. In each of those cases the facts were similar to the evidence contained in this record. Appellee relies on the case of *Pokora v. Wabash R. R. Co.*, 292 U. S. 98, to sustain the verdict in this case. The facts there did not show as stated by the Court that the train was visible to Pokora while

there was still time to stop. It was further stated in that case that a train could only be visible to Pokora for a space of not over eight feet before he reached the track, and that the testimony permitted the inference that the truck was in the Zone of danger by the time the vision was enlarged. The case expressly limited the opinion in the Goodman case in 275 U. S. 66, with reference to the duty of a driver to get out of his vehicle and reconnoiter before driving upon a railroad crossing, but did approve of the holding in the following particular:

"There is no doubt that the opinion in that case is correct in its result. Goodman, the driver, travelling only five or six miles an hour, had, before reaching the track, a clear space of eighteen feet, within which the train was plainly visible. With that opportunity, he fell short of the legal standard of duty established for a traveller when he failed to look and see. This was decisive of the case."

We believe that the Court should have set aside the verdict and granted a new trial because of the failure of the Appellee to prove that the deceased was in the exercise of ordinary care for his own safety at and before the happening of the accident.

For the reasons indicated the judgment of the Circuit Court will be reversed and the cause remanded for a new trial.

Reversed and Remanded.

77A

**Motor Acceptance Company of Illinois, a Corporation,
Plaintiff-Appellant, v. Lawrence Ehrhart,
Defendant-Appellee.**

Appeal from Circuit Court of McDonough County.

OCTOBER TERM, A. D. 1938

299 I.A. 627¹

Gen. No. 9161

Agenda No. 27

MR. JUSTICE HAYES delivered the opinion of the Court.

The sole question for decision in this case is whether the Appellee, Lawrence Ehrhart, defendant below, or the Appellant, the Motor Acceptance Company of Illinois, plaintiff below, has superior title to a certain Plymouth four-door sedan. The former claims title by purchase on January 23, 1937, from C. R. Woolsey, an automobile dealer with a salesroom located across the street from the Post Office in Macomb, Illinois. Ehrhart gave Woolsey, at the time of purchase, his check for six hundred eighteen (\$618.00) dollars, and his 1929 DeSoto car in full payment. The Motor Acceptance Company claims title by virtue of a conditional sales contract made January 6, 1937 by Everett Rainey, a salesman for C. R. Woolsey, to the Woolsey Motor Sales on the same automobile, which contract provided for payment of \$66.00 cash, five monthly payments of \$25.00 each, and one payment of \$465.00, and provided that title should remain in the seller until all payments were made. The contract further provided that the car was to be used as a demonstrator. Woolsey sold this conditional sales contract and the note attached thereto, on the day of its execution, to the Kewanee Citizens System Company, who placed it as collateral with the City National Bank of Clinton, Iowa, who afterward sold the contract and note to the plaintiff. One payment of \$25.00 on the contract was sent to the Kewanee Citizens System Company by Woolsey and credited on the contract. The car carried dealer license plates belonging to Woolsey, and a checker for the Finance Company checked it with other cars when he called weekly.



On August 3, 1937, plaintiff filed his affidavit for replevin and bond in the Circuit Court of McDonough County. A writ was issued and executed and defendant gave a forthcoming bond. A trial was had before a jury, and at the close of all the evidence, the court directed a verdict for the defendant, which verdict was rendered and judgment entered, finding the defendant was entitled to possession of the property described in said writ.

Plaintiff complains that the trial court should have heard the case without a jury for the reason that the defendant did not file a jury demand at the time of filing his appearance, but filed it at the time the plaintiff filed an amended and supplemental complaint. With the turn the case has taken by not being submitted to the jury for final decision, and the court passing on the record on a motion for a directed verdict, the plaintiff was not harmed in this matter.

The material facts in this record are few and stand out very definitely. First Ehrhart, the defendant, was an innocent purchaser for value, of the automobile in question, from a dealer in his home town. He paid cash for the full purchase price of the car, except for allowance received for his old car. He had no notice of plaintiff's lien. At the time of the purchase the car was in the salesroom, with other cars carried by the dealer. Second, the sales contract, on its face, showed the car was to be used as a demonstrator, and that checkers for the Finance Company involved in this case called weekly, and it is a reasonable deduction that they had knowledge that the car was being offered for sale by Woolsey and his salesmen. The field representative for the Finance Company testified that the conditional contract was on the demonstrator plan, which permits the man who signs the contract to operate it for the purpose of demonstrating for individuals who are interested in buying cars. The evidence further shows that this Plymouth car was, for sometime prior to January 23rd, kept in Woolsey's sale room, and it was there with ten or twelve other cars, the first time defendant looked at it. These facts are set up in the amended answer of the defendant and are established by the proofs.

Under section 23, of Chapter 121½, Illinois Statute, Bar Assoc. Edition, it is provided that, a person purchasing goods from someone who is not the owner and has no authority to sell, acquires no better title to the goods than the seller had "unless the owner of the



goods is, by his conduct, precluded from denying the seller's authority to sell."

The court said in the case of the *Illinois Bond and Investment Company v. Gardner*, 249 App. 337: "A customer going into a retail store and seeing goods on display offered to the public generally for sale, and buying the goods in good faith should be protected against the holder or owner of any secret lien of which the purchaser has no notice. To hold otherwise would seriously interrupt business. We believe the legislature in passing this statute meant to protect the owner whose goods were sold without his authority or consent, but for the protection of innocent purchasers, having no reason to suspect secret liens very wisely added, 'unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.'"

Some duty at least rests upon one who finances a retail dealer to see to it that cars upon which he has a lien are not left under the domain and control of such dealer on his salesroom floor to be offered to the public. The business of the investment company was to finance retail automobile dealers, and it did finance them for a profit. It assumes some risk as to the hazard for a profit. A person going into a place of business of a retail automobile dealer, and purchasing a new car commingled with the stock for sale, from the showroom of such dealer, without any actual knowledge that there is a lien upon such car, and who pays the full purchase price, and to whom the car is delivered, is ordinarily under no obligation to examine the records to ascertain whether there is a lien upon such car. *Gump Investment Company v. Jackson*, 142 Va. 190, 47 A.L.R. 82.

Under the holdings of this court, in the case of *Ill. Bond Investment Co. v. Gardner*, 249 App. 337, and the *National Bond Investment Co. v. Shirra*, 255 App. 415, and the *Gordon Motor Finance Co. v. Aetna Acceptance Co.*, 261 App. 536, the trial court could not do otherwise than instruct the jury to find for the defendant.

In the absence of evidence upon which a jury could, in the eye of the law, reasonably find in favor of the party holding the affirmative of an issue, a motion to direct the verdict against the party so holding the affirmative should be allowed. *American National Bank v. Woodlark*, 342 Ill. 148.

Where an affirmative defense is established by uncontradicted evidence, it is the duty of the trial court



to direct a verdict for the defendant. *Fuller v. DePaul University*, 293 Ill. App. 261.

We are of the opinion that under the uncontradicted facts of this record, the well established principles of law and under section 23 of the Sales Code of this State, that the Trial Judge did not err in peremptorily instructing the jury to find the right of possession to the property in question in the defendant, and the judgment of the Circuit Court is therefore affirmed.

Judgment Affirmed.



General Number 9130.

Appellate Number 12.

IN THE APPELLATE COURT
OF ILLINOIS
THIRD DISTRICT
APRIL TERM, A. D. 1939.

78A

STUART E. PIERSON, Administrator :
De Bonis Non With Will Annexed :
of the Estate of David Meade :
Fishback, Deceased, :

Appeal from County Court
of Greene County.

Plaintiff-Appellee, :

--vs--

LOUISE FISHBACK, Impleaded With :
David Donald Fishback, Peter :
Castleton, Archie Fullerton :
and Paul Fullerton, :

Defendant-Appellant. :

2591A.5274

HAYES, J. :

This is an appeal from the decree of the County Court
of Greene County, ordering a sale of real estate to pay debts.

David Meade Fishback died on December 6, 1927, testate,
leaving surviving as his sole heirs at law the Appellant, and
one son. The Widow was appointed executrix under the Will, but
did not qualify and nominated her nephew Guy Lowenstein, who was
appointed administrator with will annexed. Frank A. Whiteside,
a lawyer of Carrollton, Illinois, was employed as attorney for
the estate. The Will was admitted to probate and letters issued
under date of January 4, 1928. Under the terms of the Will,
after the payment of debts and funeral expenses, all the property
went to the surviving widow. Guy Lowenstein continued to act
as administrator until March 10, 1930, when he resigned. Clyde
Linder, Cashier of the Greene County Bank, was then appointed,--

on March 15, 1930--and continued to act until October 7, 1937, when he resigned. Appellee, president of the Greene County Bank, was then appointed administrator. Neither of the last two were nominated by appellant. F. A. Whiteside also acted as attorney for Clyde Linder during the time he was administrator, and also represented Dr. Howard Burns, and the Greene County State Bank, two of the largest creditors in the estate. Up to the time this proceeding was instituted, Mr. Whiteside advised appellant, and was considered by her to be her attorney.

At the time of his death, David Meade Fishback was seized and possessed of the real estate involved in this proceeding, being a farm of 310 acres and a residence in Carrollton, Illinois, which he and his family resided in, as well as personal property that amounted to \$12,488.10. The claims against the estate aggregated \$44,650.63, of which Dr. Burns' was \$16,518.00, and the Greene County State Bank \$14,083.38, leaving a deficit in the personal estate of about \$29,000.00. Immediately after his appointment, Guy Lowenstein proceeded to take charge of the farm land and collect the rents therefrom. Appellant made no objection to this. On January 11, 1929, Guy Lowenstein filed a current report in which he reported having in his hands a balance of \$11,057.37, after paying all preferred claims, costs and expenses, and asked the court for authority to pay 24 per cent upon sixth-class claims out of such balance. He further stated in his report, that in his judgment it would be unwise to sell the land, and if the sale of land be kept in abeyance, the price of farm lands might increase in value sufficient to pay the sixth-class claims in full. The Court approved this report, and ordered 24 percent payment of the sixth-class claims, and finding it was not favorable at that time to sell the real estate, ordered the administrator not to be required to file a petition to sell

real estate to pay debts until such time as creditors might insist on so doing, or until the price of real estate became more stable and said real estate be sold to better advantage.

On January 14, 1929, and after the time for filing claims had expired, appellant, on advice of her attorney Mr. Whiteside, withdrew a claim which she had filed against the estate in the sum of \$2,469.77, on notes of her husband, representing money from her father's estate which she had loaned to her husband. Clyde Linder, upon his appointment as administrator, continued to collect the rents from the farm. During the time he was administrator,--a period of about seven years-- he was never asked to sell the farm by any of the creditors, and he did not file an application to sell the real estate because of depressed land values. While he was administrator, he paid an additional dividend of 9 per cent upon the sixth-class claims. Appellee likewise continued to collect the rents from the farm, after he was appointed administrator. There was no demand made upon him to sell the real estate. He decided it was favorable to sell, as there did not appear to be much prospect of an increase of value, and on November 16, 1937--almost ten years after the issuance of original letters--Appellee filed his application herein for the sale of said real estate to pay debts.

The only question involved in this case is whether appellee is guilty of laches in his long delay in making application, and whether there has been a reasonable excuse shown for this delay.

While the statute of limitations in Illinois fixes no time within which a claim against the estate of a deceased person shall be enforced against the land of which he dies

seized, yet by analogy the time has been established by the courts at seven years after his death unless there is some valid reason for further delay. *Goodrun v. Mitchell*, 356 Ill. 183, 187; *Hurlbut v. Talbot*, 273 Ill. 299, 309; *McKeen v. Vick*, 108 Ill. 373, 376.

Appellee's reason for undue delay in the application is that creditors were "appeased and lured to acquiescence by payment of dividends and that they had a right to believe that the application of rents from the farm toward the payment of their claims were sanctioned and approved by Louise Fishback (appellant), and that so long as dividends were paid they would in the end secure their money, and further that appellant did not want the farm sold to pay debts and that she asked a creditor not to force the sale of it."

The proofs show that appellant was not anxious for the sale, but the responsibility for taking the initial steps in making application for sale of real estate to pay debts was not on her, but on the administrator and the creditors. It is also true that she permitted the administrator to collect rents from the land and apply them to the debts, but under her testimony she states that nothing had ever been said to her about her having the rents on the land. She further states that Mr. Whiteside, who was her legal advisor, never told her she was entitled to these rents, and the first knowledge she had on this subject was after this application to sell was filed and she engaged Judge Hutchens as her lawyer. Mrs. Fishback testified that Whiteside phoned her and she went to his office and he advised her that he expected the estate to be settled up shortly and proposed that she withdraw her claim which was on file for \$2,469.77, and that he further stated to her: "If you will comply with this, I am sure you will get six or eight thou-

sand dollars out of the estate." She stated that she then went to the court house and withdrew the claim. It appears from the record that at this time Whiteside was representing the Greene County Bank, who had a claim of \$14,000.00; and also the Burns claim which was over \$18,000.00. Whiteside, in his testimony, admits he advised her to withdraw the claim, and further states that the advice turned out to be bad. The creditors got all the rents for the intervening years as well as getting the surviving widow to relinquish what appears to be a bona fide claim, and although it is probably a reasonable deduction from the entire record that both sides and everyone interested were wishfully hoping that land values would advance, there is nothing in the record to indicate that there was a binding bargain made with appellant for the delay.

To speculate on market values is not recognized as a reasonable excuse for delay where it is the duty of an administrator or executor to sell. *Pope v. Ritchell*, 354 Ill. 248, 256; *Vierieg v. Krehmke*, 293 Ill. 265, 271; *White v. Horn*, 224 Ill. 238, 245; *Graham v. Brock*, 212 Ill. 579, 582.

This application not having been made until after the expiration of seven years, the burden to show justification for delay rests on appellee. The only proof made by Appellee in meeting this burden is that land values were depressed and that the widow lured them to sleep. We cannot hold that this is a reasonable excuse, particularly when administrator makes application to sell real estate to pay debts without offering to account to the Widow for rents received which belonged to her, and without offering to put her back in status quo on her claim that was withdrawn at the instance of the attorney for the two largest creditors. The decree of sale would have been more equitable and wholesome, if the court below had ordered the administrator account to Mrs.

Fishback for the rents during the years intervening since the granting of letters to the time of sale, and had ordered that she be permitted to pro-rate with the other sixth-class creditors on her claim. If the decree is allowed to stand as entered, it will take the entire farm, and deprive the widow of her claim and rents which she was entitled to, and which she would have had by following the procedure prescribed by law with reasonable dispatch. To leave this decree stand would be an imposition on Mrs. Fishback and would work an injustice.

For the reasons herein stated, the decree of sale of the County Court of Greene County is hereby reversed and cause remanded.

REVERSED AND REMANDED.

IN THE APPELLATE COURT
OF ILLINOIS
THIRD DISTRICT

Stover 1938
JANUARY TERM, A. D. 1939.

STUART E. PIERSON, Administrator : APPEAL FROM COUNTY COURT
De Bonis Non With Will Annexed : OF GREENE COUNTY.
of the Estate of David Meade :
Fishback, Deceased, :

Plaintiff-Appellee, :

- vs - :

LOUISE FISHBACK, Impleaded With :
David Donald Fishback, Peter :
Castleton, Archie Fullerton :
and Paul Fullerton, :

Defendant-Appellant. :

HONORABLE C. . . WINDOFF,

JUDGE PRESIDING.

299 I.A. 627-10

WYATT, J. ;

This is an appeal from the decree of the County Court of Greene County, ordering a sale of real estate to pay debts.

David Meade Fishback died on December 6, 1927, testate, leaving surviving as his sole heirs at law the Appellant, and one son. The Widow was appointed executrix under the Will, but did not qualify and nominated her nephew Guy Lowenstein, who was appointed administrator with will annexed. Frank A. Whiteside, a lawyer of Carrollton, Illinois, was employed as attorney for the estate. The Will was admitted to probate and letters issued under date of January 4, 1928. Under the terms of the Will, after

- 2 -

the payment of debts and funeral expenses, all the property went to the surviving widow. Guy Lowenstein continued to act as administrator until March 10, 1930, when he resigned. Clyde Linder, Cashier of the Greene County Bank, was then appointed—on March 15, 1930—and continued to act until October 7, 1937, when he resigned. Appellee, president of the Greene County Bank, was then appointed administrator. Neither of the last two were nominated by appellant. F. A. Whiteside also acted as attorney for Clyde Linder during the time he was administrator, and also represented Dr. Howard Burns, and the Greene County State Bank, two of the largest creditors in the estate. Up to the time this proceeding was instituted, Mr. Whiteside advised appellant, and was considered by her to be her attorney.

At the time of his death, David Meade Fishback was seized and possessed of the real estate involved in this proceeding, being a farm of 310 acres and a residence in Carrollton, Illinois, which he and his family resided in, as well as personal property that amounted to \$12,488.10. The claims against the estate aggregated \$44,630.63, of which Dr. Burns' was \$18,318.50, and the Greene County State Bank \$14,083.38, leaving a deficit in the personal estate of about \$29,000.00. Immediately after his appointment, Guy Lowenstein proceeded to take charge of the farm land and collect the rents therefrom. Appellant ^{ant} made no objection to this. On January 11, 1929, Guy Lowenstein filed a current report in which he reported having in his hands a balance of \$11,057.27, after paying all preferred claims, costs and expenses, and asked the court for author-

ity to pay 24 per cent upon sixth-class claims out of such balance. He further stated in his report, that in his judgment it would be unwise to sell the land, and if the sale of land be kept in abeyance, the price of farm lands might increase in value sufficiently to pay the sixth-class claims in full. The Court approved this report, and ordered 24 percent payment of the sixth-class claims, and finding it was not favorable at that time to sell the real estate, ordered the administrator not to be required to file a petition to sell real estate to pay debts until such time as creditors might insist on so doing, or until the price of real estate became more stable and said real estate be sold to better advantage.

On January 14, 1929, and after the time for filing claims had expired, appellant, on advice of her attorney Mr. Whiteside, withdrew a claim which she had filed against the estate in the sum of \$2,462.77, on notes of her husband, representing money from her father's estate which she had loaned to her husband. Clyde Linder, upon his appointment as administrator, continued to collect the rents from the farm. During the time he was administrator, — a period of about ⁷seven years — he was never asked to sell the farm by any of the creditors, and he did not file an application to sell the real estate because of depressed land values. While he was administrator, he paid an additional dividend of 9 per cent upon the sixth-class claims. Appellee likewise continued to collect the rents from the farm, after he was appointed administrator. There was no demand made upon him to sell the real estate. He decided it was favorable to sell, as there did not appear to be much prospect of an increase of value, and on Nov-

~~under~~
ember 16, 1937 — almost ten years after the issuance of original letters—Appellee filed his application herein for the sale of said real estate to pay debts.

The only question involved in this case is whether appellee is guilty of laches in his long delay in making application, and whether there has been a reasonable excuse shown for this delay.

While the ~~statute~~ of Limitations in Illinois fixes no time within which a claim against the estate of a deceased person shall be enforced against the land of which he dies seized, yet by analogy the time has been established by the courts at ⁷seven years after his death unless there is some valid reason for further delay. Goodrun v. Mitchell, 236 Ill. 183, 187; Hurlbut v. Talbot, 273 Ill. 299, 309; McKean v. Vick, 108 Ill. 373, 376.

Appellee's reason for undue delay in the application is that creditors were "appeased and lured to acquiescence by payment of dividends and that they had a right to believe that the application of rents from the farm toward the payment of their claims were sanctioned and approved by Louise Fishback (appellant), and that so long as dividends were paid they would in the end secure their money, and further that appellant did not want the farm sold to pay debts and that she asked a creditor not to force the sale of it."

The proofs show that appellant was not anxious for the sale, but the responsibility for taking the initial steps in making application for sale of real estate to pay debts was not on her, but on the administrator and the creditors. It is also true that she permitted the adminis-

under the 1947-48 Act. The 1947-48 Act was passed by the House of Commons on 17th July 1947. The 1947-48 Act was passed by the House of Commons on 17th July 1947.

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~~SECRET~~

trator to collect rents from the land and apply them to the debts, but under her testimony she states that nothing had ever been said to her about her having the rents on the land. She further states that Mr. Whiteside, who was her legal advisor, never told her she was entitled to these rents, and the first knowledge she had on this subject was after this application to sell was filed and she engaged Judge Hutchings as her lawyer. Mrs. Fishbank testified that Whiteside phoned her and she went to his office, and he advised her that he expected the estate to be settled up shortly and proposed that she withdraw her claim which was on file for \$2,469.77, and that he further stated to her; "If you will comply with this, I am sure you will get six or eight thousand dollars out of the estate." She stated that she then went to the court house and withdrew the claim. It appears from the record that at this time Whiteside was representing the Greene County Bank, who had a claim of \$14,000.~~00~~; and also the Burns claim which was over \$18,000.~~00~~. Whiteside, in his testimony, admits he advised her to withdraw the claim, and further states that the advice turned out to be bad. This lawyer was representing adverse interests. In this transaction Appellant got the worst of it, to the advantage of Whiteside's other two clients. The creditors got all the rents for the intervening years as well as getting the surviving widow to relinquish what appears to be a bona fide claim, and although it is probably a reasonable deduction from the entire record that both sides and everyone interested were wishfully hoping that land values would advance, there is nothing in the record to indicate that there was a binding bargain made with appellant for the delay.

~~SECRET~~

To speculate on market values is not recognized as a reasonable excuse for delay where it is the duty of an administrator or executor to sell. Pope v. Kitchell, 354 Ill. 248, 266; Vierieg v. Krehmke, 293 Ill. 265, 271; White v. Horn, 224 Ill. 238, 245; Graham v. Brock, 212 Ill. 579, 582.

This application not having been made until after the expiration of ¹seven years, the burden to show justification for delay rests on appellee. The only proof made by Appellee in meeting this burden is that land values were depressed and that the widow lured them to sleep. We cannot hold that this is a reasonable excuse, particularly when administrator makes application to sell real estate to pay debts without offering to account to the widow for rents received which belonged to her, and without offering to put her back in status quo on her claim that was withdrawn at the instance of the attorney for the two largest creditors. The decree of sale would have been more equitable and wholesome, if the court below had ordered the administrator account to Mrs. Fishback for the rents during the years intervening since the granting of letters to the time of sale, and had ordered that she be permitted to pro-rate with the other sixth-class creditors on her claim. If the decree is allowed to stand as entered, it will take the entire farm, and deprive ~~at~~ the widow of her claim and rents which she was entitled to, and which she would have had by following the procedure prescribed by law with reasonable dispatch. To leave this decree stand would be an imposition on Mrs. Fishback, and would work an injustice, particularly when it resulted from a lawyer trying to serve clients with adverse interests.

171

On March 2, 2004, the author, in the presence of

~~27~~

For the reasons herein stated, the decree
of sale of the County Court of Greene County is hereby
reversed and cause remanded.

REVERSED AND REMANDED.

which are shown in the annexed map and
plan of the same, and in which the same is also shown.

It is to be observed that

IRENE KATHERINE THIELEN,
Appellant,

-vs-

VINCENT PAUL THIELEN,
Appellee

Appeal from Circuit Court, McLean County.

January Term, A.D. 1939

299 I.A. 627³

Gen. No. 9176

Agenda No. 8

Mr. Justice Fulton delivered the opinion of the Court.

On the 25th of January, 1937, a Decree was entered in the Circuit Court of McLean County awarding a divorce to the Appellant, Irene Katherine Thielen, and against the Appellee Vincent Paul Thielen, on the grounds of desertion. There were no children born of the marriage and the Decree required the Appellee to pay to the Appellant the sum of \$125.00, per month, and the use of the Homestead premises located at 1518 East Grove Street in the City of Bloomington, Illinois. There were other provisions concerning the use and division of property.

On the 23rd of August, 1938, the Appellant filed a Petition in the Circuit Court praying that the Court modify the said Decree of Divorce in the following respects:

1. That the monthly payment of \$125.00 be increased;
2. That part of certain insurance monies alleged to be due the Appellee be given to the Petitioner;
3. That she be awarded one-half of the net income from two grain elevators and a farm belonging to the Appellee;
4. That she be awarded a one-half interest, together with her dower rights, in the said elevators and the farm.

The grounds advanced by the Appellant for modification of the Decree were that she was under medical care and needed additional funds to pay doctor bills; that she could not make both ends meet on the sum of \$125.00, per month; that due to the condition of her health and the fact that the

THE NEW YORK PUBLIC LIBRARY

1928 A 1 689

1. The following information was obtained from the records of the Library:

On the 28th of January, 1928, a letter was received from the Library of Congress, Washington, D.C., dated January 28, 1928, in which it was stated that the Library of Congress had received a copy of the report of the Committee on the Organization of the Library of Congress, dated January 28, 1928, and that the Library of Congress had decided to accept the recommendations of the Committee. The report of the Committee was published in the Library of Congress Bulletin, No. 1, dated January 28, 1928, and was entitled "Report of the Committee on the Organization of the Library of Congress". The report was published in the Library of Congress Bulletin, No. 1, dated January 28, 1928, and was entitled "Report of the Committee on the Organization of the Library of Congress". The report was published in the Library of Congress Bulletin, No. 1, dated January 28, 1928, and was entitled "Report of the Committee on the Organization of the Library of Congress".

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surroundings in Bloomington, Illinois, where her Homestead is located, are utterly incompatible with the state of her mental and physical well-being, the Petitioner was not able to reside in the house on East Grove Street in Bloomington, Illinois, and was obliged to pay considerable sums for lodging each month while residing in Chicago.

The Appellee filed a motion to strike the Petition contending that the subject matter was res adjudicata; that the petition did not state or allege any change in the circumstances or conditions of either of the parties or any other matter which would justify the Court in modifying said Decree. The case went to a hearing before the Court without any further answer or denial being filed. It is apparent that the motion to strike was considered as an answer to the petition because oral testimony was introduced by both the Appellant and Appellee on the hearing. The Petitioner testified that she was living at the Edgewater Beach Hotel in the City of Chicago, and also in detail explained the cost of living respecting food, clothing and many other incidental expenses. It included such items as Lodge dues, tuition at a Law School and Doctors bills. Her conclusion was that the payment of \$125.00, per month was totally inadequate to meet her necessary living expenses.

The Appellee testified that he spends less than \$75.00, per month for food, clothes and lodging, and that he is paying the Appellant more money each month than he has for himself; that he has paid the taxes on the Homestead premises each year, and that his income was less than at the time the Decree was entered.

The Court denied the petition to modify the Decree, and it is that ruling of the Court which the Appellant seeks to reverse by this appeal.

Sec. 19 of the Divorce Act provides, that the Court may make such order touching the alimony and maintenance of the wife as from the circumstances of the parties and the nature of the case shall be fit, reasonable and just; and the Court may, on application from time to time, make such alterations in the allowance of alimony and maintenance as shall appear reasonable and proper.

The application for an alteration or modification of the Decree is always addressed to the judicial discretion of the Chancellor, and, ordinarily, in the absence of fraud in procuring the Decree, the inquiry is, in all cases, whether sufficient cause has intervened since the decree to authorize or require the Court, applying equitable rules and

principles, to change the allowance. Cole v. Cole, 142 Ill. Page 21. Smith v. Smith 334 Ill. 370.

The question presented to the Court in this case, therefore, was whether or not the circumstances of the parties had changed sufficiently to warrant the alteration and modification of the allowance awarded in the original Decree.

It appears to this Court that the needs and necessities of the Appellant have been created by her own acts and conduct in desiring to live at a Hotel in the City of Chicago where the expenses are much larger than her mode of living to which she had been accustomed at the time the original Decree was entered. There is no proof that the ability of the husband to contribute or pay a larger sum per month has changed. In fact the testimony in the case shows that his ability to pay has diminished since the entry of the Decree. The fact that the Appellant is dissatisfied with the terms of the former Decree is not sufficient to give the Court power to alter or modify the allowance.

There is no basis in the proof for granting to the Appellant the other additional property rights she seeks. To grant such relief would be equivalent to reversing the action of the Chancellor in the original Decree. The parties had their day in Court with the right of appeal if the Decree was deemed erroneous and the Circuit Court had no power to change or modify such Decree upon the same facts which existed at the time of its entry.

The Chancellor heard and saw the parties on the hearing of this petition and his ruling in denying the prayer of the petition seems to us entirely just and correct. The order or Decree of the Circuit Court is therefore affirmed.

AFFIRMED.

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

299 1A 6274

OCTOBER

TERM, A. D., 19³⁸

At an APPELLATE COURT for said Fourth District, State of Illinois, begun and held at Mt. Vernon, in said State, on the 25th day of October, the same being the Fourth Tuesday in said month of October, 19³⁸, said term of said Court being held according to law.

PRESENT:

Hon. LOREN E. MURPHY, Presiding Justice

Hon. LAWRENCE E. STONE, Justice

Hon. HARRY EDWARDS, Justice

WALLER M. BUCKHAM, Clerk

CLYDE D. MITCHELL, Sheriff

Court opened by proclamation.

ATTEST:

Waller M. Buckham, Clerk.

BE IT REMEMBERED, that afterward, to-wit: On the 13th day of March, A. D. 19³⁹, there was filed in the office of the said Clerk of said Court, an opinion of said Court, in words and figures following, to-wit:

OCTOBER TERM, A.D. 1958

Term No. 5

Agenda No. 14

LYE MCCRE,
Appellee

Vs .

METROPOLITAN LIFE INSURANCE COMPANY, a corporation,
Appellant.

Appeal from the Circuit

Court of Saline County.

Murphy, J :

This action was to recover on an industrial life policy issued by the defendant on the life of Vallie B. Moore, the wife of the plaintiff. The suit was started before a justice of the peace and therefore is without pleadings. Plaintiff recovered a judgment in the circuit court and defendant appeals.

The material policy provisions were that the policy constituted the entire agreement, that if the insured was not alive or not in sound health on the date of issue then in such case the insurer may declare the policy void and its liability shall be limited to a return of the premiums paid, except in case of fraud in which case the premiums were to be forfeited to the company. The policy was incontestable after it had been in force during the lifetime of the insured for one year from date of issue.

The insured made application for the policy August 15, 1935, it was issued September 1 and insured died March 14, 1936, from pulmonary tuberculosis. The premiums were all paid. There was no medical examination prior to the issuance of the policy. Defendant contends that insured was suffering from the disease from which she died at the time of the making of the

application and the issuance of the policy and that therefore she was not of sound health and that the policy is void and it is only liable for a return of the premiums for which it made proper tender.

On the back of the application and immediately preceeding certain questions and answers appears the following, "To induce the Metropolitan Life Insurance Company, to issue Policy and its consideration therefore I agree, on behalf of myself and of any other person who shall have or claim interest in any policy issued under this application." The material part of the application then states that she had never had tuberculosis, that she was then in sound health and had no physical defect or infirmity; that she had not been under the care of a physician within three years except for occasional headache. It concludes that statements recorded are true and complete and she agreed that any misrepresentation would render the policy void and that the policy should not be binding unless upon its date she was alive and in sound health.

Defendant offered the application in evidence and plaintiff objected on the grounds that the policy constituted the entire contract and that the application was therefore immaterial. The case was being tried without a jury and the court admitted it subject to the objection.

The statutory provision Sub. Sec. 261, Chapt. 73 Ill. Rev. Stat. which requires that a copy of the application should be endorsed upon or attached to the policy and made a part thereof and that the application and policy shall constitute the entire contract has no application to industrial policies Sec. 266. In view of the statute and the policy provision that the policy constituted the entire contract the application was not admissible as being a part of the contract of insurance but it was admissible upon the question whether there was preliminary fraud in the application. It is evident that the representations

contained in the application formed the inducement to the obligor to make the contract. No medical examination having been made it was the only source of knowledge for defendant to know of applicant's physical condition. It is true that since the application was not attached to the policy or made a part of it that the matters stated therein were representations and not warranties, *Spence vs. Central Accident Insurance Co.* 236 Ill. 444 but fraud would vitiate the policy and a false representation as to a material fact knowingly made would constitute fraud. The application was admissible on the issue of fraud.

The evidence discloses that insured was treated by three doctors prior to making the application. Dr. Johnson early in 1935 Dr. Beltz, July 1935, Dr. Skelton 1934. All these doctors testified. Dr. Johnson stated that he treated insured for a cold but that in his opinion she then had pulmonary tuberculosis but that he told the insured she had a cold. Dr. Beltz stated he treated her for general debility which in his opinion had existed for a few months but he did not give it as his opinion that she then had tuberculosis. Dr. Skelton treated her for headache in 1934.

November 3, 1935 insured entered Boehne Tuberculosis Hospital at Evansville, Indiana for treatment and was discharged November 17. At the time of the first entry, in connection with her examination, she gave a history of her case. This became part of the hospital records and was introduced in evidence by defendant. Plaintiff objected assigning various grounds. Proper foundation was laid and the contents of the history sheet was material to the issue of fraud. *Hranicka vs. Prudential Ins. Co.* 236 Ill. App. 237.

The history sheet as taken by Dr. Wood showed that in July 1934 insured spit up a little blood but she thought it was throat trouble, that in January 1935 she had influenza and stayed in bed one week and after that her health was bad. In May she developed a cold and started coughing more and began to ex-

pectorate. She had night sweats and lost weight and strength. In May her physician put her in bed diagnosing the case as tuberculosis. While in bed she gained some weight and felt better. Dr. Grim who conducted the physical examination at the Boerne Hospital testified that upon her first entrance November 3, 1935 she had rales over the upper lobe of the right lung and roughened breathing over the upper lobe of the left lung, that rales indicated some pathology in that lobe which after an X-ray and spectrum test was determined to be tuberculosis. He gave it as his opinion that she had been so afflicted for six months prior to her first examination.

The only counter evidence is the testimony of the plaintiff. He stated that on the date of the issuance of the policy the insured was in good health and that she did her work caring for the home. He knew of her being treated by the several doctors mentioned but stated that he did not know of the tuberculosis until after she entered the Boerne Hospital.

In *Sulski vs. Metropolitan Life Ins. Co.* 196 Ill. App. 76 the court held that the fact of the sound health of the insured at the date of the policy was what determined the liability of the insurer, not the apparent health of the insured or anyone's belief that the insured was in sound health at that time.

Under the evidence we are constrained to hold that the insured had tuberculosis on the date of the issuance of the policy and that she had knowledge of her condition at the time she made the application. The statements in the application as to her health and that she had never been afflicted with tuberculosis were material representations to the issuance of the policy and the known falsity of the same constituted fraud.

One afflicted with pulmonary tuberculosis is not of sound health as a matter of law. *Carroll vs. Metropolitan Life*

Ins. Co. 258 Mass. 249, 154 N. T. 757; Isvandoski vs. Equitable Life Ass'n. Co. 103 N. J. L. 643, 137 A. 414.

Counsel for plaintiff relies upon Walsh vs. Prudential Ins. Co. 235 Ill. App. 226. In the Walsh case statements in the application were held to be representations and not warranties. The distinction between the Walsh case and the one at bar is that in the Walsh case the court found that statements were not knowingly false while in this the evidence of the hospital record shows that insured had been told weeks before the application that she had tuberculosis and the symptoms she had as given by her for the history sheet were such as are universally known to accompany tuberculosis.

For the reasons assigned the judgment is reversed.

Reversed.

I, JAMES R. MCLAUGHLIN, Clerk of the Appellate Court, within
and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true
copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

In TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at

Mt. Vernon, this 1st day of October, A. D. 19 60.

James R. McLaughlin
Clerk of the Appellate Court.



OPINI



STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT
OCTOBER TERM, A. D. 1938.

81A

Term No. 20

Agenda No. 8

UNION TRUST COMPANY OF EAST ST. LOUIS,
Executor and Trustee of the Last Will
and Testament of JOSEPH KARNER, Deceased,
Appellee,

299 I.A. 628

vs.

DORA KARNER, BENJAMIN KATZ, DAVID KARNER,
Syek Karner, Libo Spiegel, the Unknown
Heirs and Devisees of JOSEPH KARNER,
Deceased, and Unknown Owners, Defendants,

Appeal from
the Circuit
Court of St.
Clair County,
Illinois.

Maurice S. Karner,

Appellant.

Murphy, J:

This suit was started by the executor and trustee of the Last Will and Testament of Joseph Karner, deceased, to construe said will and for directions. The testator left one son, his only heir at law who is defendant appellant on this appeal.

The will after directing the payment of debts and certain specific legacies to testators former wife and a nephew, bequeathed one half of the residue to his son and as to the other one half he disposed of it as follows;
"The balance of my estate shall be bequeathed to the following persons; David Karner's children-Lee Karner's children and Syek Karner's children, all residing in Poland--in the State of Woline, County of Kraminitz and Town of Lonovite. Also Libo Spiegel and children, all residing in Russia--State of Woline, County of Zaslof and Town of Belaratka. This balance of my estate shall be divided equally among

my relatives' children and the money shall be immediately sent to my relatives in Europe, who are in starvation, after my decease."

The court entered a decree construing various clauses of the will and gave the executor certain directions. This appeal is from that part of the decree which construes the paragraph above set forth. The construction placed upon it was that the bequests therein provided for should go to the children of David Karner, Lee Karner, Syek Karner and to Libo Spiegel and her children share and share alike and that all of said legatees should share per capita and not per stirpes. Defendant appellant contends in this court that the evidence shows that the legacies lapsed by reason of the death of the legatees before the testator and that the one half descended to him as intestate property. Considerable evidence was introduced to sustain that contention. That question was not raised by the pleadings and it does not appear that the trial court made any finding upon it. It cannot be raised for the first time on appeal.

Defendant-appellant further contends that the clause is so indefinite and ambiguous as to a designation of the beneficiaries that it should be decreed to be void. The bequest is that the balance shall go to David Karner's children, Lee Karner's children, Syek Karner's children and to Libo Spiegel and children. The evidence shows that David Karner, Lee Karner and Syek Karner were brothers of testator and that Libo Spiegel was a cousin. There is no need to cite authority to the proposition that property may be bequeathed to the children of a certain named person without giving the names of the children. The persons who take are those who can qualify as belonging to that class. Whether there are persons who can

qualify is another question and one that is not before this court on this appeal. The first part of the clause is an absolute bequest to the children of the persons named except as to Libo Spiegel and she is included as one of those to take with her children.

The sentence that "this balance of my estate shall be divided equally among my relatives' children" refers to the one half which is the subject of this bequest and the word my relatives' children refers to the children of the three brothers and the cousin and her children. The latter part of the sentence that "the money shall be immediately sent to my relatives in Europe who are in starvation after my decease" is not the creating of a new bequest, but is a direction to the executor as to payment. The words "relatives in Europe" refers to the same persons previously mentioned that is the children of his brothers and his cousin and her children and the words "who are in starvation after my decease" is not a reduction of the bequest given in the first part of the clause but is a direction to the executor to make payment immediately to those who had been previously named that were in starvation.

The court correctly construed this clause of the will and that part of the decree appealed from is affirmed.

Decree Affirmed.

Abstract

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

OCTOBER TERM, A.D. 1938.

Term No. 32

Agenda No. 23

RUDY PHILLIPS, Next Friend
of Bluford W. Logsdon,
Plaintiff,

vs.

WILLIAM L. FORD, Judge of the
County Court, Gallatin County,
State of Illinois.
Defendant.

299 I.A. 628²

Petition for writ of
Mandamus.

Per Curiam:

Rudy Phillips, a minor by her next friend filed in this court an original petition for a writ of mandamus against William L. Ford, Judge of the County Court of Gallatin County and seeks by this original proceeding to mandamus the said respondent as county judge to compel him to take such court action as may be necessary to require the administrator of an estate pending in his court in which petitioner is interested, to file report and take other steps in the administration of said estate. This action is not in aid of any proceeding pending in this court and this court has no jurisdiction in such an action. People vs. Knodell 40 Ill. App. 101; Jennings vs. Horton 59 Ill. App. 519.

Petition dismissed.

Abstract

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

OCTOBER TERM, A. D. 1938.

Term No. 33

Agenda No. 24

BEN EMGE,
Appellee,

vs.

ILLINOIS CENTRAL RAILROAD
COMPANY, a Corporation,
Appellant.

299 I.A. 628³

Appeal from the Circuit
Court of St. Clair County,
Illinois.

Per Curiam:

By this action plaintiff seeks to recover damages for personal injuries sustained when the automobile which he was driving was struck at a private crossing by one of defendant's trains. Plaintiff recovered a judgment for \$4000. from which defendant appeals.

Various points are alleged as grounds for reversal but only two have been argued. All others are deemed to have been waived. The two argued are that no negligence is proven and that plaintiff cannot recover because of his contributory negligence. Both questions were raised on the trial by a motion for a directed verdict.

The complaint contains three counts, the first charges that the defendant had for 15 years prior to the accident sounded a whistle at this crossing but that on the occasion of the accident it negligently failed to give such warning. The negligence charged in the second count is that immediately west of the crossing the track has a sharp curve that runs through a deep cut with a bank on the right-of-way to the north of the track and that defendant permitted weeds, brush and trees to grow on said bank so that it obscures the view to the west for one who is at or near the crossing, that the defendant had

knowledge of such dangerous condition and that it negligently drove its train toward said crossing without giving warning of any kind. The third count charges failure to ring the bell and blow the whistle as required by statute at public crossings. Defendant denied all charges of negligence.

Plaintiff resided on a farm near Belleville that was severed by defendant's right-of-way, the residence and other farm buildings were located north of the right-of-way. The private crossing where the accident happened furnished plaintiff the means of ingress and egress to the land south of the track and the public highway. The crossing was about 200 feet south and east from the house and there was a slight down grade from the residence to the crossing.

A short distance west of the crossing the track curves to the north and west. At the curve it passes through a cut leaving a bank on the right-of-way to the north of the track. At the time of the accident the bank was overgrown with weeds, brush and small saplings. This growth extended to within six or seven feet of the north rail. The growth extended to within 125 to 150 feet of the private crossing.

Plaintiff testified that he drove slowly toward the crossing and stopped with the front end of his car 8 or 10 feet from the nearest rail, that he looked west and stood there for several seconds looking and listening for a train and not seeing any and not hearing any train shifted to low gear and started across the crossing. He drove in low gear and continued to drive until the collision. The driveway over the crossing curves so that an automobile does not cross at right angle to the track. The train was 75 or 80 feet away when he first saw it. He stated that when his automobile was stopped the point where he was sitting to the nearest rail was 12 to 14 feet and at that point his view to the west was unobstructed for 300 feet and beyond that he could not see. He stated there was no whistle blown or bell rung.

At the time of the accident it was raining and the window on the driver's side was open but the others were closed.

Marilyn Emge, a daughter of the plaintiff, who was riding in the back seat testified that plaintiff stopped the automobile 8 or 10 feet from the track, that plaintiff looked and listened for a train and that it was stopped for three or four seconds. She testified that no signal of any kind was given by the train crew.

Plaintiff's wife and son, Ben, were in the house and both testified that no whistle sounded or bell rung. Cletus Biver, an employee was in one of the farm buildings and he testified to the same.

Three men residing in that vicinity were called to testify for plaintiff and all of them corroborate plaintiff's evidences as to the growth of weeds and brush on the bank and the obstruction it furnished to one looking to the west from the crossing.

The evidence is that from a point between the rails at the crossing the view was unobstructed to the west for a distance of 600 to 800 feet. Five feet north of the crossing the open view was 400 feet and 8 to 10 feet north it was reduced to 300 feet.

Plaintiff had resided at the place for 15 years, was well acquainted with defendant's operation of its trains over this track and conditions at the crossing. The train crew in charge of train were likewise familiar with the conditions at the crossing.

It appears that this track was used almost exclusively for east bound trains and that this train was going the usual direction and on the regular schedule. The train consisted of an engine and eleven cars and was running 45 miles per hour.

In consideration of the appeal in the Marilyn Emge case growing out of this same accident we held that there was no statutory duty resting on defendant to give statutory signals

when the trains approached this crossing but that aside from statute there was a common law duty to give notice of the approach of trains at all points of known or reasonably apprehended danger. C. & A. R.R. Co. vs. Dillon 123 Ill. 570; C.B. & Q. R.R. Co. vs. Perkins 125 Ill. 127; C. & A. R.R. Co. vs. Sanders 154 Ill. 531; I.C. R.R. Co. vs. Scheffner 106 Ill. App. 344; Coyne vs. C.C.C. & St.L. Ry. Co. 208 Ill. App. 425.

If the conditions shown at this crossing made it a place of danger than it was under a common law duty to give notice of the approach of its trains for the conditions shown to exist were such that it had full knowledge of their existence or was charged with knowing of the same.

Whether the crossing was a place of danger was a question of fact and there is ample evidence in the record to support the court's ruling in submitting that question to the jury; the jury by their verdict having found that the crossing was a place of danger it was also a question of fact whether the defendant gave any warning of its approach.

There is a sharp conflict in the evidence as to whether a whistle was blown or bell rung. Plaintiff and some of his witnesses testified positively that none were given while the train crew testify with equal emphasis that both were given.

There was some evidence introduced by plaintiff to the effect that it had been the custom of the defendant for many years to blow a whistle and ring a bell at this crossing but as to whether there was sufficient evidence to support the court's ruling in submitting those counts charging such negligence we express no opinion for the verdict being general we are satisfied that there was evidence to support the charge of negligence in the second count.

The question of contributory negligence was raised in the Marilyn Inge case and although she was a child of tender years and only chargeable with the care that a child of her age and experience would be expected to exercise, and the negligence

of her father would not be imputable to her, we believe that the points discussed and cases cited are applicable in this case. We there said, "Defendant contends that since the view was unobstructed for a distance of at least 300 feet west of the crossing, that is in the direction of the approaching train, the plaintiff and her father should have seen the train and that when they testify they did not see it, it is manifest that they did not do that which they testified they did. If the automobile was stopped 8 to 10 feet north of the track and then started over the crossing in low gear and was struck on the crossing when the train was traveling 45 miles per hour it is very probable that at the time plaintiff and her father looked, the train was not within the 300 feet of unobstructed view. Defendant relies upon such cases as Grubb vs. Ill. Terminal Co. 366 Ill. 330; Provenzano vs. I.C. R.R. Co. 357 Ill. 192; Greenwald vs. B. & O. R.R. Co. 332 Ill. 627. The evidence in the Grubb case was that 50 ft. south of the crossing there was a clear view for a distance of 450 ft. and 75 ft. south of the crossing a clear view of 175 ft. and that at a point of 100 feet south, the view was 112 ft. In the Provenzano case the evidence was that for a distance of 25 ft. from the track the view was not obstructed for 900 to 1000 ft. In the Greenwalk case 30 to 40 ft. from the crossing the view was unobstructed for a distance of 200 ft. In Lewis vs. Illinois Terminal Co. 276 Ill. App. 610 an abstracted opinion, this court held the plaintiff's intestate was not in the exercise of due care for his own safety at a crossing where he could see an electric car approaching 700 ft. down the track when he was 20 to 30 feet from the crossing."

We are of the opinion that there was no error in submitting the question of plaintiff's due care to the jury.

The judgment of the circuit court is affirmed.

Judgment Affirmed.

Abstract

RESERVE BOOK

Illinois. Unpublished opns.

299-
77738

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3/1/64	W. J. Lawrence	FR 2-1947
5/14/64	O. R. Harris	
4/1/66	W. J. Lawrence	FR 2-1947
	W. J. Lawrence	CG 8-4166
	W. J. Lawrence	CG 8-4166
2/1/67	K. Permin	FE 2-0913
	W. J. Lawrence	FI 6-4722
	W. J. Lawrence	793257d
	W. J. Lawrence	726-0820
2/22/72	W. J. Lawrence	221-0318
3/4/72	V. J. Porter	CG 1-10660
5/9/72	B. Platt	AN 3-3718
6/2/72	B. Platt	AN 3-3718
3/7/73	J. J. Platt	786-0300
6/15/73	W. J. Lawrence	786-0246
7/14/73	J. J. Platt	CE 6-4787
8/1/73	J. J. Platt	0346-9740
8/25/75	J. J. Platt	236-9552
9/3/75	J. J. Platt	346-8520
3/9/77	J. J. Platt	341-2626
9/12/77	J. J. Platt	372-1947
10-24-77	J. J. Platt	33-3009
12-13-77	J. J. Platt	443-0286
2-9-78	J. J. Platt	346-7800
	J. J. Platt	372-0242

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